The Madras Law Journal Reports.

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Wallis.

C. Venkatasubbiah Chetty .. Appellant *
v. (*Plaintiff.*)
T. Govindarajulu Naidu .. Respondent
(*2nd Defendant.*)

Venkata-subbiah Chetty v. Govinda-rajulu Naidu.

Evidence Act, Ss. 91, 92—" Terms of the contract "—Question as to the parties contracting—Oral evidence—Admissibility—Proof that obligor signed as member of a firm.

The question as to who the contracting parties are is not one relating to the terms of the contract within the meaning of Ss. 91, 92 of the Evidence Act: and oral evidence is admissible to show that a person who signed a deed did so not only for himself but also as an agent for others, *e.g.*, as a member of a firm.

On Appeal from the judgment of Mr. Justice Boddam in the Ordinary Original Civil Jurisdiction of this Court.

S. Guruswami Chetty and *S. Venkatachariar* for appellant.

P. Anandacharlu for respondent.

The Court delivered the following

JUDGMENT :—The plaintiff alleges that the 1st and 2nd defendants were partners and that they borrowed from the plaintiff the amount for which the bond was given.

The bond was signed by the first defendant only. We are unable to agree with the learned judge that it was not open to the plaintiff to give evidence of circumstances which went to show that the first defendant signed the bond on his own behalf and as the agent of his partner, the second defendant (assuming the first and second defendants were partners.) The law is thus laid down in Lindley on Partnership, Edition 7 on page 207:—"If therefore a partner only enters into written contract the question whether the contract is confined to him or whether it extends to him and his

* O. S. A. No. 68 of 1906. 29th November 1907.

Venkatasubbiah Chetty v. Govindarajulu Naidu.

co-partners, cannot be determined simply by the terms of the contract. For, supposing a contract to be entered into by one partner in his own name only, still if in fact he was acting as the agent of the firm, his co-partners will be in the position of undisclosed principals; and they may, therefore, be liable to be sued on the contract although no allusion is made to them in it. This was expressly decided in the well known case of *Beckham* v. *Drake*.[1] There Drake, Kinght and Sturge were in partnership as type-founders, but Drake was a secret partner. A written agreement relating to the partnership business was entered into between the plaintiff and Knight and Sturgey and for a breach of this agreement by them the action was brought: Drake's name did not appear in the agreement; he did not sign it; nor, when the contract was made, was he known to the plaintiff to be a partner. It was, nevertheless, held that all three partners were liable jointly for a breach of the agreement inasmuch as the agreement itself was clearly entered into by the firm; and Drake like any other undisclosed principal was liable to be sued as soon as his position was discovered." In Roscoe's Nisi Prius Evidence the law is stated thus :—"In an action on a written contract, between plaintiff and *B*, oral evidence is admissible in behalf of the plaintiff to show that the contract, was, in fact, though not in form, made by *B* as agent of the defendant, for the evidence tends not to discharge *B*, but to charge the dormant principal; *Wilson* v. *Hart*[2]: and it is admissible although *B* named his principal at the time he entered into the contract. *Calder* v. *Dobell*."[3] In our opinion, there is nothing in S. 91 or S. 92 of the Indian Evidence Act which is inconsistent with these decisions, since a question as to who the contracting parties are, is not, in our opinion, one of the terms of the contract within the meaning of these sections. We may further remark that none of the illustrations to the sections deals with this question. It would seem, therefore, that it was not the intention of the Legislature to depart from what would appear to be the settled rule under the English Law.

We must, therefore, set aside the decree and send the case back to the Court of First Instance in order that the evidence may be admitted Costs will abide the event.

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1. (1849) 2 H. L. C. 579; 11 M. W. 315. 2. (1817) 7 Taunt 295.
3. (1871) L. R. 6. C. P. C. Ex. Ch. 486.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF LOWER BURMA].

Present :—Lord Robertson, Lord Collins and Sir Arthur Wilson.

Ma Wun Di and another .. Appellants.*

v.

Ma Kin and others .. Respondents.

Ma Wun Di v. Ma Kin.

Marriage—Presumption—Essentials to raise presumption—Practice — Point not submitted to either Court in India raised before the Privy Council—Issue—Construction of.

Before applying the presumption of marriage arising from cohabitation with habit and repute, it is necessary to make sure that the conditions necessary for its existence do exist. First of all, there must be some body of neighbours, many or few, or some sort of public, large or small, before repute can arise. Secondly, the habit and repute, which alone is effective, is habit and repute of that particular status which, in the country in question, is lawful marriage. The difference between English and Oriental customs about the relations of the sexes makes such caution especially necessary. Among most English people, open cohabitation without marriage is so uncommon that the fact of cohabitation in many classes of society of itself sets up, as a matter of fact, a repute of marriage. But in countries where customs are different it is necessary to be more discriminating, more especially owing to the laxity with which the word "wife" is used by witnesses in regard to connections not reprobated by opinion, but not constituting marriage.

Their Lordships declined to entertain a point raised by the appellants as covered by a certain issue, as the point was not submitted to either of the Courts below and the parties have, by their conduct of the case, shown that they construed the issue in a narrower sense.

Their Lordships' judgment was delivered by

Lord Robertson :—The question in this appeal is one of fact ; and it has been decided against the appellants by two Courts. The case, however, deserves attention, for there has been a strong appeal made to the general presumption of marriage arising from cohabitation with habit and repute.

It is necessary, before applying this presumption to make sure that we have got the conditions necessary for its existence. It is not superfluous to suggest that, first of all, there must be some body of neighbours, many, or few, or some sort of public, large or small, before repute can arise. Again, the habit and repute, which alone is effective, is habit and repute of that particular status which, in the country in question, is lawful marriage.

* 2nd December 1907.

Ma Wun Di v. Ma Kin.

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In the present case the broad facts are these :—A domiciled Burman, Maung Gale, has his house and wife at Moulmein in Burma; his business took him to Siam, and there he lived for years with various other women, and with the principal appellant, Ma Wun Di, who for shortness will be called the appellant. The appellant has maintained that while the other women were concubines she was a wife, taken as a second wife, the first wife being all the time in Burma.

The opposite contention is that while the appellant was older than the other women (who all lived in the same house) and had for that reason and also for reasons of choice, a stronger hold on the man, yet she has not made out the status of a wife. It is a noticeable feature of the case, that the appellant, in her own evidence, and in the evidence of other witnesses examined for her, endeavoured to set up a marriage ceremony as having inaugurated the connection; but her counsel in the appeal declined to maintain this part of her case, which was represented as resting on habit and repute. Now the first difficulty is that apparently this is a part of the world where there are not many people at all to act the part of neighbours or the public, and at all events there is no tangible evidence of recognition of this woman, in her quality of wife, by people external to the house and independent of it. What evidence she has is that of the people who either speak to the abandoned marriage ceremony or distinguish her position in the house as one of more consequence and her stay in it as of longer duration than those of the other women. In truth when all is said there is little more pointing to marriage than the use of the word " wife " by some of the witnesses; and the most cursory as well as the most careful examination of the evidence shows that it is applied to persons whose status is not matrimonial.

Nor has the appellant, in evidence or in argument, faced the grave difficulty which arises from the existence of the lawful wife in Burma. The following observations of the Chief Judge are apposite and weighty :— Ma Wun Di v. Ma Kin.

" It not forbidden to a Burman Buddhist to have two wives at the same time ; but it is universally conceded that the leading principle of Buddhism is rather monogamy than polygamy ; that polygamy is rare and that it is considered disrespectable On the contrary, I should be inclined to say that if a woman cohabits with a Burman the presumption is that she is a mistress and not a wife and I would add that the presumption is strengthened if, as in the present case, the cohabitation is behind the back and without the knowledge of the first wife. "

There remains to be noticed one point which the appellant's counsel treated as part of his case of habit and repute, and which seemed to be regarded as the most substantial item of it. Maung Gale in 1887, obtained a certificate of nationality as " a British subject proposing to travel in Siam " and as part of the docket of renewal which is signed by the Acting Vice-Consul are the words: " Names of female relations living with Maung Gale (1) Ma Wun Di, wife : (2) Mun, sister-in-law." The argument upon this document is that the appellant could only be entitled to be named in this certificate of nationality, if by marrige, she had acquired her husband's certified nationality. On this, however, it is to be observed first, that this is not evidence of repute at all. The Vice-Counsel is not proved to have had any personal knowledge of these people at all, and the most it comes to is, that on this occasion Maung Gale said that Ma Wun Di was his wife. But further any value or relevance which this writing has in the present case is entirely taken away by the addition of the sister-in-law who on no theory was a naturalised British subject.

The appellant's counsel endeavoured to raise the question whether the second appellant who is the son of the first appellant by Maung Gale was not entitled to a share of Maung Gale's estate, even assuming no marriage to be proved. Whether the third issue in the suit was in its terms susceptible of the wider construction thus suggested for it or not, the parties by their conduct of the case have construed it in the narrower sense of assuming the existence of a marriage ; and the point urged by Mr. Roskill having been submitted in the conduct of the case to neither Court; their Lordships are unable to entertian this question..

Ma Wun Di v. Ma Kin.

Their Lordships will humbly advise His Majesty that the appeal ought to be dismissed. The appellants will pay the costs of the appeal.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[APPEAL FROM THE CALCUTTA HIGH COURT.]

Present:—Lord Robertson, Lord Collins and Sir Authur Wilson.

Fatima Bibi and others .. Appellants.*

v.

Sheikh Ahmed Buksh and others .. Respondents.

Fatima Bibi v. Sheikh Ahmed Buksh.

Mahomedan Law—Gift—Marz-ul-mout—Death Illness—Question of fact—Privy Council Practice.

In deciding whether a gift is invalid under the law of *marz-ul-mout*, the right question to be solved is, whether the deed was executed by the donor under apprehension of death ; and that question is essentially one of fact.

Where a question is one of fact, their Lordships will not interfere even if it should appear that there was evidence such as might justify either view without any clear preponderance of probability.

Their Lordships' judgment was delivered by

Lord Collins:—The question in this case is whether a certain deed of gift made by one Moulvi Dadar Buksh, deceased, in favour of his son Sheik Ahmed Buksh is invalid by reason of the Mahomedan Law of *Marz-ul-mout* relating to gifts made in death illness. The deed was executed on the 21st May 1897 and on the 27th of the same month Moulvi Dadar Buksh, the donor, died. A great number of the objections to the deed were urged by the appellants (the defendants) before the Subordinate Judge, all which were considered in great detail and overruled by him in a most elaborate judgment in favour of the respondents. That judgment was affirmed on appeal by the High Court at Fort William and it is the concurrent judgments of these two tribunals that this Board is now called upon to overrule. The only point which the appellants have argued on this occasion was that which no doubt goes to the root of the matter, *viz.*, whether the gift was invalid under the law of *Marz-ul-mout*. The test which was treated as decisive of this point in both Courts was : Was the deed of gift executed by Dadar Buksh under apprehension of death? This, which appears to their Lordships to

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* 2nd December 1907.

Fatima Bibi v. Sheikh Ahmed Buksh.

be the right question, is essentially one of fact, and of the weight and credibility of evidence upon which a Court of review can never be in quite as good a position to form an opinion as the Court of First Instance, and it would probably be enough to prevent this Board from interfering if it should appear that there was evidence such as might justify either view without any clear preponderance of probability. Their Lordships are, however, clearly of opinion that the reasons given both by the Subordinate Judge and the High Court, which they will not repeat, establish a large preponderance of probability in favour of the conclusion at which they both arrived.

Their Lordships will, therefore, humbly advise His Majesty that this appeal be dismissed.

The appellants will pay the costs of the first respondent who alone defended the appeal.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE ALLAHABAD HIGH COURT.]

Present :—Lord Robertson, Lord Collins and Sir Arthur Wilson.

Musammat Surajmani and others .. Appellants.*

v.

Rabi Nath Ojha another .. Respondents.

Surajmani v. Rabi Nath Ojha.

Hindu Law—Will—Construction—Gift to wife—"Malik," meaning of—Presumtion—Onus.

The use of the word "malik" in a deed of gift or a will imports the grant of full proprietary rights to the donee or the devisee ; and in order to cut down the absolute ownership that the word imports something must be found in the context to qualify it ; and the fact that the donee is a woman and a widow does not suffice to displace the presumption.

The principles of interpretation laid down in *Lalit Mohun Singh Roy* v. *Chukkan Lal Roy*[1] are of general application, though the donee in that case was a male.

Their Lordships' judgment was delivered by

Lord Collins :—This is an appeal from the High Court at Allahabad confirming the decision of the Subordinate Judge of Gorakhpur. The question is whether the 1st appellant Musammat Surajmani acquired a right to alienate the property now in suit under a deed of gift or testamentary instrument of her late

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* 5th December 1907.

1. (1897) L. R. 24 I. A. 76 ; s. c. I. L. R. 24 C. 834.

Surajmani v. Rabi Nath Ojha.

husband Ishwar Nath Ojha. The material part of the document is as follows:—

"I now of my own free will and accord while in a sound state of mind and in enjoyment of my senses make a gift of the entire village Dwarkapur Nankar in Tappa Asnari and half of the village Telpurwa in Tappa Pachhar to Musammat Dhanmati, my first wife, the entire village Doharia Khurd in Tappa Banjarha and half of Mauza Telpurwa aforesaid to Musammat Surajmani, my second wife, and half of Mauza Jamla Jot (*i. e.*) an eight anna share in it, in Tappa Barikpur to Musammat Sarsuti, my daughter-in-law, out of the aforesaid property without consideration, on the conditions that during my life time, I shall remain in possession of the said property as heretofore, and my name shall remain recorded in respect of it in the public records and the Musammats aforesaid shall be maintained by me, that after my death they shall under this document get their names recorded in the public records in respect of their respective properties given to them and remain in possession as owners with proprietary powers, and that if, perchance, I have a male issue hereafter this deed of gift shall be considered null and void as against him."

The words translated "as owners with proprietary powers" are in the original *malik wa khud ikhtiyar*. The appellants contend that these words are amply sufficient to confer an alienable estate. The respondents, on the other hand, contended, and the Courts below have held, that under these words the lady took more than the ordinary estate of a Hindu widow, which is alienable except in special conditions which are not alleged to exist in this case.

After the death of her husband, Musammat Surajmani entered into possession of the property given to her and has purported to dispose of it by will in favour of her brother Ram Narain Ojha. The present suit is brought by the plaintiffs (respondents) as heirs of Ishwar Nath and Surajmani for a declaration that the latter was incompetent to execute the said will, and it is against the decision in their favour that this appeal is brought. The effect of the word *malik* in testamentary gifts has been often discussed in cases decided in the different Courts in India where there has been apparently some fluctuation of opinion. For instance, since this case was decided in the High Court of Allahabad, the same Court, constituted differently, has refused to follow it, and expressed the opinion that the words in question passed the absolute estate—*Padam Lal* v. *Tek Singh.*[1]

1. (1906) I. L. R 29 A. 217 at pp. 221-222.

In the present case, the Subordinate Judge seemed to recognise that the trend of the decisions of the Calcutta Courts was opposed to his view, but felt bound to follow what he thought was the result of the Allahabad cases, which were binding upon him.

In *Kollany Kooer* v. *Luchmee Pershad*[1] decided in 1875 *Mitter* J. in dealing with the case of a will where the donees were the widow and the daughter of the testator and the word "*malik*" was used, thus expresses himself—(at p. 396.)—

"As far as the words go, I think it is plain that the testator intended to make an absolute gift of his property in favour of his widow and daughter. He says that after his death they shall be (*maliks* proprietors and his entire estate shall devolve upon them."

In *Jotendro Mohun Tagore* v. *Ganendro Mohun Tagore*[2] the Judicial Committee say (at p. 365): "If an estate were given to a man simply without express words of inheritance it would, in the absence of a conflicting context, carry by Hindu law (as under the present state of the law it does by will in England) an estate of inheritance. In the testamentary instrument under our consideration, from the context it does not appear that the testator intended a limited gift in favour of Bani Kooer and Uma Kooer. Therefore, adopting the rule of construction above quoted, we must hold that the gift in question was an absolute gift unless it can be shown that, by the Hindu Law, gift to a female means a limited gift or carries with it the effect of creating an estate exactly similar to the 'widow's estate' under the law of inheritance. I am not aware of any such provision in the Hindu Law, nor have we been referred to any authority in support of it."

The question as to the effect of the word *malik* came before this Board in 1890 in the case of *Lalit Mohun Singh Roy* v. *Chukkun Lal Roy*.[3] The donee in that case was a man, but the principles of interpretation laid down were of general application. Referring to the donee the testator said:—

"If no children are born to me......or if at the time of my death they are not alive then.... my nephew......becoming on my death my sthalabhishikta and becoming owner *malik* of all my estates and properties, etc., shall, remaining my sthalabhishikta, obtaining the management of Iswarshebas......enjoy with son, grandson, and so on in succession the proceeds of my estate...... The minor, on reaching majority shall exercise ownership (*malikatwa*) over all the properties."

In delivering the judgment, Lord *Davey* at p. 88 says:—

"It was not disputed......that the son of the testator, if there had been one, or his daughter, if there had been one, would have taken an absolute, heritable and alienable estate......"

1. (1875) 24 W. R. 395.
2. (1872) 18 W. R. 359.
3. (1897) L. R. 24 I. A. 76; s.c. I. L R. 24 C. 834.

Surajmoni v. Rabi Nath Ojha.

Nor was it disputed that the words of gift to the appellant were such as to confer on him also an heritable and alienable estate. The words 'become owner *malik* of all my estates and properties' would, unless the context indicated a different meaning, be sufficient for that purpose even without the words 'enjoy with son, grandson and so on in succession' which latter words are frequently used in Hindu wills and have acquired the force of technical words conveying an heritable and alienable estate."

This case seems to adopt and apply the same view of the word *malik* as was taken in the Calcutta case in the *Kollany Kooer* v. *Luchmee Pershad*[1] above cited, with the result that in order to cut down the full proprietary rights that the word imports, something must be found in the context to qualify it. Nothing has been found in the context here or the surrounding circumstances or is relied upon by the respondents but the fact that the donee is a woman and a widow, which was expressly decided in the last mentioned case not to suffice. But while there is nothing in the context or surrounding facts to displace the presumption of absolute ownership implied in the word *malik*, the context does seem to strengthen the presumption that the intention was that *malik* should bear its proper technical meaning. It is to be observed that the gift to the testator's daughter-in-law, Musammat Saraswati, is made in precisely the same terms. The learned counsel for the respondents was unable to adduce any reason for holding that in her case the gift should be cut down to anything less than a full proprietary right, and if this be admitted, the respondents have to contend for two contradictory interpretations of the same phrase.

In the result, therefore, with the greatest respect to the learned Judges in the Courts below, their Lordships are unable to agree with their decision.

Their Lordships will humbly advise His Majesty that the appeal be allowed and the decrees of both Courts below discharged and instead thereof the suit dismissed with costs in both Courts. The respondents will pay to the appellants the costs of this appeal.

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1. (1875) 24 W.R. 395.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Boddam and Mr. Justice Sankaran Nair.

Singan Setti Sanjivi Kondayya and others .. Appellants*
(*Defendants* 2 *to* 5.)

v.

Draupadi Bayamma *alias* Venkamma .. Respondent
(*2nd Plaintiff.*)

Hindu Law—Widow—Alienation—Consideration in part, binding on reversioners—Suit by reversioners to set aside—Pleadings—Contents—Decree, frame of.

Kondayya v. Bayamma.

A Hindu widow is not bound to mortgage any portion of her husband's estate, if that be more prejudicial to her than a sale by reducing her income to a greater extent, as she does not hold the property for the benefit of the reversioner, nor is she bound to raise money on her personal security.

The right of a reversioner to set aside a sale deed executed by a Hindu widow which is in part for a consideration binding upon the reversioner, depends upon his refund of at least so much of the consideration as is binding upon the reversion, and in a suit to set aside the sale, the reversioner should offer to reimburse the *bona fide* purchasers of so much of the money as has been legitimately advanced.

[*Mutteeram Kowar* v *Gopaul Sahoo*[1] followed.]

Courts could not in the lifetime of the widow properly decree that upon her death the deeds should be set aside upon payment, by the persons who should succeed to the estate, of the amount which the widow was entitled to raise, inasmuch as it would be contingent upon the will of the persons who might succeed to the inheritance whether they would pay the amount or not and the purchaser could not properly be placed by a decree of the court in a state of uncertainty as to whether or not he could safely expend capital in the improvement of the estate. Such a decree would be unjust to the purchaser and it would be contrary to public policy to place an estate in that position in which it could not be known whether the estate could be safely improved or not.

[*Poolchand Lal* v. *Raghoobuns Suhaye*[2] followed. *Sugeeram Begam* v. *Juddoobuns Sahaye*[3] referred to. *Gobind Singh* v. *Baldeo Singh*[4] dissented from.]

Second Appeal from the decree of the District Court of Cuddapah in A. S. No. 38 of 1904 presented against the decree of the Court of the District Munsif of Cuddapah in O.S. No. 602 of 1903.

Dr. S. Swaminadhan for appellants.

B. Sitarama Raw for *C. Ramachandra Rau Sahib* for respondent.

The Court delivered the following

JUDGMENT:—The plaintiffs as the reversionary heirs of their father brought this suit against the 1st defendant, his

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* S. A. 575 of 1905. 30th October 1907.

1. (1873) 11 B. L. R. 416.
2. (1867) 9 W. R. 108.
3. (1865) 9 W. R. 284.
4. (1903) I. L. R. 26 A. 330.

Kondayya v. Bayamma

widow, and other defendants who were alienees claiming under her, to set aside the sale in their favour by the 1st defendant on the grounds that there was no necessity for such sale and that these lands of the value of Rs. 1,500 were sold for Rs. 540.

Out of this sum of Rs. 540, the 2nd defendant who had attached the properties in execution of his decree for Rs. 340 which he had obtained against the 1st defendant as representative of her husband, was paid his decree debt The 1st defendant also discharged a debt of Rs. 180 incurred for the funeral ceremonies of her husband and the remaining portion of the purchase money was paid in discharge of another debt also found to be binding on the reversioners. It is thus proved that the sale was effected for the purpose of discharging debts binding on the reversion, and the purchase money has been applied in payment of those debts. It is also found that the property sold for Rs. 540 was worth about Rs. 1,000. On these findings, the Court of First Instance passed a decree declaring "that the alienations made by the 1st defendant in favour of the other defendants are not valid after her lifetime, and that the plaintiff or the then existing reversioner will be entitled to recover the lands from the defendants in payment to them of Rs. 540—which is found to be a binding debt." This decree has been confirmed by the District Judge. This is an appeal from that decree. We are of opinion that this decree cannot be sustained. The attaching creditor could have forced a sale. There is no finding by the lower Courts and there is no evidence to show that these debts could have been paid off by the widow otherwise than by a sale of this property; she is not bound to mortgage any portion of her husband's estate if that be more prejudicial to her than a sale by reducing her income to a greater extent as she does not hold the property for the benefit of the reversioner, nor is she bound to raise money on her personal security. The lower Courts have also decided that the reversioner, after the widows' death, is entitled to recover possession only on payment of the amount found to be binding. A suit brought by the heir after the widow's death where the plaint contained no offer to pay the money when it should have contained such offer was dismissed on that ground—see *Mutteeram Kowar* v. *Gopaul Sahoo* [1] This view appears to have been accepted by their

1. (1873) 11 B. L. R. 416.

Kondayya v. Bayanuna.

Lordships of the Privy Council. In a case where the suit was brought to set aside an alienation by a widow of property which was claimed by the plaintiff to be debutter property devoted to an idol, their Lordships after declaring that the widow, as the manager of the estate, had the same right as, or a right analogous to that of the manager of an infant heir say : "Their Lordships are still of opinion that the plaintiff could not succeed on this plaint in setting aside the deed because if part of the money was required for the repairs of the idol or was represented to have been so required and this was *bona fide* believed in by the grantees, the deeds would not be wholly void by reason that some money was raised for another purpose. It would then come to this, that too much of the idol's property may have been granted; that a less quantity of land than that included in the grants would have sufficed to raise the money required for the temples. But that should not be a sufficient ground for setting aside the deeds altogether. The plaintiff in that case should have offered to reimburse the *bona fide* purchaser so much of the money as had been legitimately advanced," and they add that the "suit in the present form could not have been sustained."

Even assuming this to be a mere question of pleading, there can, therefore, be no doubt that the right of the heir to set aside the deed and recover possession of the property from the appellants depends upon his refund of at least the purchase-money. Whether he is not also bound to pay interest, etc., as decided in *Phoolchand Lall* v. *Raghubuns Sahaye*[1] has not been argued before us.

If the sale, then, can be set aside only on condition of the plaintiffs refunding the purchase money that is held to be binding on the reversion, how can a declaratory decree setting aside the sale be passed in favour of the plaintiffs without also a direction to refund such money? Ordinarily an expectant reversioner would not pay the money out of his own pocket as he might never be benefited thereby, since the purchase would, notwithstanding such payment, continue in possession till the widow's death as the reversioner would not till then be entitled to possession and he might not be entitled to it at all in the event of not surviving the widow. In the case before us there was no offer by the plaintiffs to refund the purchase money nor is such a reversioner entitled to

1. (1867) 9 W. R. 108.

Kondayya v. Bayamma.

a decree as is passed in this case for the reasons stated by BARNES PEACOCK in *Phoolchand Lal* v. *Raghubuns Suhaye.*[1] The learned Chief Justice held that the Court could not properly decree "in the lifetime of the widow that upon her death the deeds should be set aside upon payment, by the persons who should succeed to the estate, of the amount which the widow was entitled to raise in as much as it would be contingent upon the will of the persons who might succeed to the inheritance whether they would pay the amount or not, and the purchaser could not properly have been placed by a decree of the Court in a position in which for many years he might remain in a state of uncertainty as to whether or not he could safely expend capital in the improvement of the estate. Such a decree would have been unjust to the purchaser and it would be contrary to public policy to place an estate in that position in which it could not be known whether the estate could be safely improved or not." This decision was followed in *Sugeeram Begam* v. *Juddoobuns Suhaye.*[2] The learned Judges of the Allahabad High Court profess (not) to follow the decision above cited in *Gobind Singh* v. *Baldeo Singh.*[3] If that judgment is inconsistent with the decision in *Phoolchand* v. *Raghubuns*[1] we are unable to follow it. There is no decision of this Court brought to our notice. Though the question was apparently raised in A. S. No. 119 of 1,901 the learned Judges have not expressed any opinion on this point.

For the above reasons, we reverse the decrees of the Courts below and dismiss the suit with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Munro.

Kamakshi Pillai and another .. Appellants* (*Attaching Creditors Nos.* 2 *and* 5.)

v.

Ramasamy Pillai and another .. Respondents (*5th Defdt. and Attaching Creditor No.* 4.)

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* O. M. S. A. No. 21 of 07. 27th November 1907.

1. (1867) 9 W. R. 108. 2. (1865) 9 W. R. 284.

3. (1903) I. L. R. 25 A. 330.

Limitation Act, Art 179 Cl. 4—Step in aid of execution—Application not in accordance with law.

Kamakshi Pillai v. Ramasamy Pillai.

An application for execution though not in accordance with law, may help to save limitation if it contains a prayer for the issue of a notice under S. 248 C. P. C, in a case in which a notice is necessary in order to enable execution to proceed.

Appeal from the order of the District Court, Madura, in A. S. No. 530 of 1905 presented against the order of the District Munsif of Periyakulam in E. A. No. 326 of 1905 in E. P. R. No. 280 of 1905 (O S. No. 98 of 1890 on the file of the District Munsif's Court, Dindigul.)

K. Ramachandra Aiyar for *K. Srinivasa Aiyangar* for appellants.

T. K. Venkatarama Sastri for *The Acting Advocate-General* (*P. S. Sivaswami Aiyar*) for respondents.

The Court delivered the following

JUDGMENT:—In *Pachiappa Achari* v. *Poojali Seenan*[1] it was held that an application for execution, though not in accordance with law, may be held to save limitation if it contains an application for the issue of a notice under S. 248 of the Code of Civil Procedure in a case in which a notice is necessary in order to enable execution to proceed. That case was followed by a Bench of this Court in C. M. S. A. No. 87 of 1905 and the same view was taken in *Gopal Chunder Manna* v. *Gosina Das Kalay*.[2]

Following these decisions, we think that inasmuch as a notice was in the present case a necessary preliminary to execution and the defective application for execution contained an application for notice, we must hold that the application of the 27th March 1902 saves the bar of limitation.

The order of the District Judge is reversed and that of the Court of first instance restored with costs here and in the lower appellate Court.

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1. (1905) I. L. R. 28 M. 557.

2. (1898) I. L. R. 25 C. 594.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Wallis.

Pattatherunath Chettumindaiakath Parkum Siyali Kundy Thayethunkandy Pathumma and others .. Appellant* (*Plaintiff*).

v.

Mannam Kunniyal Parkum Siyali Kandy and others .. Respondents. (*Defendants* 1, 2 & 4 *and Legal Representatives of* 1*st Defendant.*)

Pathumma v. Siyali Kandy.

Malabar law—Marumakkathayam law—Gift by Mahomadan husband to wife and children governed by Marumakkathayam law—Estate taken.

Held, that in the case of a gift to a woman and her children, governed by the Marumakkathayam law, by her husband, a Mahomedan, the donees take the property with the incidents of tarwad property.

Second Appeal from the decree of the District Court of North Malabar in A. S. No. 431 of 1903, presented against the decree of the Court of the District Munsif of Quilandy in R O. O. No. 456 of 1901.

T. R. Ramachandra Aiyar for appellants.

T. Richmond for 2nd respondent.

The Court delivered the following

JUDGMENT:—In this case it appears that one Uthothi, a Moplah made a gift of land to his wife, Ayissa, who belonged to a tarwad governed by the Marumakkathayam law and the question is, to whom does the land descend on Ayissa's death. The District Judge has dealt with the case as if the question were to whom it descended on the death of Uthothi. Uthothi being a Muhammadan, the presumption may be that his property would descend according to Muhamadan Law according to *Assan* v. *Pathumma*[1] and *Kunhunbi Umma* v. *Kandy Moithin*[2] the cases relied on by the District Judge. We think, however, that the present case is

* S. A. 1401 of 1904. 2nd December 1907.

1. (1897) I.L.R. 22 M. 494
2. (1903) I.L.R. 27 M. 77.

Pathummah v. Abdulla Haji.

governed by the decision of the Full Bench on facts very similar to the present in *Kunhacha Umma* v. *Kutti Mammi Hajee*[1] which has been followed and explained in *Koroth Amman Kutti* v. *Perungottil Appu Nambiar*.[2] In the first of these cases, property given to one Ayissamma and her children after the death of her husband Taruvai in accordance with his orally expressed wish was held to be taken by Ayissamma who was governed by the Murumakkathayam law and her children as their exclusive property with the incidents of tarwad property. In that case, the donor, Taruvai, was a Mahomedan and it was stated in argument at page 206 that he was governed by the Marumakkathayam law, but the fact that the donor was a Mahomedan was not held as affecting the decision. In *Koroth Amman Kutti* v. *Perungottil Appu Nambiar*[2] it was held that in the case of a gift to a woman governed by the Marumakkathayam law and to her children by their father the donees take such property with the incidents of tarwad property, but that the gift by the father does not of itself constitute the mother and children separate tarwad. In the present case, though the property was purchased in the name of the mother Ayissa, the District Judge holds, we think rightly, that it was intended for her children as well. If so, according to the decision of the Full Bench, the land became the exclusive property of Ayissa and her children with the incidents of tarwad property. Under these circumstances, the alienations complained of by the 1st plaintiff are invalid and the plaintiffs have a right to a decree for redemption.

We must accordingly reverse the decree of the District Judge and give the plaintiffs a decree as prayed for with costs throughout and 6 months for redemption from date of decree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT :—Mr. Justice Boddam and Mr. Justice Munro.

Gouri .. .. Appellant.* (*Plaintiff*).

v.

Tirumaya Bhatta and others .. Respondents (*Defendants* 1 *to* 3).

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*S. A. No. 1894 of 1904. 20th December 1907.

1. (1892) I. L. R. 16 M. 201.

2. (1906) I. L. R. 29 M. 322.

Gouri
v.
Tirumaya
Bhatta.

Hindu Law—Reversioner—Suit by—Widow—Alienation partly for binding purposes, not void—Setting aside—Terms.

A sale by a widow effected for the purpose of discharging debts binding on the reversion, even though more money than was actually necessary for the purpose of discharging the debts was obtained by the sale, is not void and cannot be set aside at the instance of the reversioner except on the payment of the amount binding on the reversion with interest when the widow dies.

Relief by way of a declaration is purely a discretionary relief. Where the reversioner who sued for it did not offer to pay the debt binding upon the reversion, the Court refused to grant the declaration.

Second Appeal from the decree of the District Court of South Canara in A. S. No. 318 of 1903, presented against the decree of the Court of the District Munsif of Kasaragod in O. S No. 442 of 1902.

V. C. Seshachariar for *N. Babu Rau* for appellant.

K. R. Subrahmanya Sastri for respondents.

The Court delivered the following

JUDGMENT :—The plaintiff sues for a declaration that a sale-deed executed by the 2nd defendant in respect of immoveable property belonging to her late father is invalid to bind her share of the property after her mother's death on the ground that the consideration mentioned in it was false and fictitious.

The plaintiff and the 3rd defendant are the only daughters of one Narayana Bhatta, deceased. The 2nd defendant is his widow, and the first defendant is the husband of the 3rd defendant. The sale was by the 2nd defendant to the 1st defendant, her son-in-law.

It is found by both the lower Courts that the consideration mentioned in the deed is not false or fictitious.

The consideration was Rs. 2,500. This consisted, according to the finding of the District Judge, partly of a debt incurred by the deceased, partly by various proper items for necessary ceremonies and funeral expenses, partly Rs. 70 paid to plaintiff and the 3rd defendant (making Rs. 140) and a sum of Rs. 1,000 to be kept with the 1st defendant till the death of the 2nd defendant and then paid in equal shares to the plaintiff and her sister, the 3rd defendant ; as consideration for being permitted to retain the money, the 1st defendant was to pay Rs. 55 a year for her life time for her maintenance.

Gouri v. Tirumaya Bhatta.

In these circumstances, the plaintiff's suit necessarily, in our opinion, fails and is rightly dismissed. The property was sold for debts binding on the reversioner, and, though even more money was obtained by the sale than was required for that purpose, the sale is not void and cannot be set aside except on payment of the amount binding on the reversioner with interest when the widow dies—see *Phool Chund Lal* v. *Raghubuns*,[1] *Mutteeram Kowar* v. *Gopaul Saboo*[2] and S. A. 575 of 1905.[3]

Here the plaintiff asks for a declaratory decree (which in any case is a purely discretionary decree) that the sale is not binding on her share after her mother's death. She does not ask for a decree declaring the rights of the reversioner at the time of the death of the widow, and does not offer to pay off what was binding on the reversioner. In fact she only asks for a decree declaring that her share in the property is not bound on the ground that the consideration in the deed is false and fictitious. She has no share in the property and may never have any share in it, and the consideration in the deed is not false or fictitious.

We dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—Mr. Justice Wallis and Mr. Justice Sankaran Nair.

Punnayil Kutt .. Appellant* (*Defendant.*)

v.

Raman Nair and others .. Respondents (*Plaintiffs.*)

Punnayi Kutt v. Raman Nair.

Limitation Act, Arts. 95, 62, 97—Suit for damages for fraud—Onus—Proof of fraud—Suit by assignor against assignee for fraudulent assignment.

In a suit for damages for fraud, when it is doubtful at what precise time the fraud became known to the plaintiff, the onus is on the defendant to show that the suit is out of time.

A suit for damages by an assignee of a debt against the assignor for having fraudulently assigned the debt when it was not really due to the latter (the assignor) is governed by Art. 95 of the Limitation Act and not by Art. 61 or 97.

The assignee is not bound to assume the truth of the debtor's case as to the non-existence of the debt assigned as soon as the debtor files his written statement in the suit against him on the assigned debt; and time, for a suit for damages by the assignee

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* S. A. No. 256 of 1905. 5th December 1907.

1. (1867) 9 W. R. 109. 2. (1873) 11 B. L. R. 416.

3. (1907) 18 M. L. J. 11.

Punnayil Kutti v. Raman Nair.

against the assignor for fraudulent assignment, was held to have run in the case from the date of the judgment of the Munsif in the prior suit declaring that the debt was not due to the assignor.

Second Appeal from the decree of the District Court of South Malabar in A. S. No. 461 of 1904 presented against the decree of the Court of the District Munsif of Chowghat in O. S. No. 417 of 1903.

J. L. Rosario for appellant.

C. V. Anantakrishna Aiyar for respondent.

The Court delivered the following

JUDGMENT :—This case has been dealt with in the lower Courts as if the question were whether the suit is one for money had and received by the defendant for the plaintiffs' use and so governed by Art. 62 of the Limitation Act, or one for money paid upon an existing consideration which afterwards failed and so governed by Art. 97. In our opinion, neither of these Articles is applicable to the present suit. The plaint states that as a result of auction chit fund transactions Rs. 405 was found due by the defendant to the plaintiff; that the defendant represented that Rs. 511-11-0 was due to him by Pathummi Umma and two others who were also members of the chit fund and asked the 1st plaintiff to take an assignment of this debt which the 1st plaintiff did; that the 1st plaintiff subsequently sued Pathummi Umma and the two others making the present defendant a party when it was found that Pathummi Umma and others were regularly paying the subscription and the defendant was receiving them, till September 1899, for some months after the date of Exhibit *B*, the assignment deed to the 1st plaintiff. It is then set out in paragraphs 6 and 7 of the plaint that as the defendant deceitfully made the respresentation to the 1st plaintiff that the money was due from Pathummi Umma and the others, he was overpowered to assign the debt; that the 1st plaintiff was entitled to recover damages, and in para 10, the cause of action is said to have arisen on the 30th July 1901, the date of the appellate decree in the 1st plaintiff's suit against Pathummi. In our opinion, this is clearly a suit to recover damages for fraud and such a suit is governed by Art. 95—*Bank of Madras* v. *Multan Chand Kanyalal*[1]. The question then is: When did the fraud become known to the plaintiffs? It has been contended for the appellant that this happened in November 1899 when

1. (1903) I. L. R. 27 M. 348.

Punnayil Kutt v. Raman Nair.

Pathummi and the others put in their written statements repudiating liability in O. S. No. 631 of 1899, the suit filed against them by the 1st plaintiff. This written statement was notice to the 1st plaintiff that if Pathummi's case was true, he had been defrauded by the present defendant, but he was not bound to assume that the case set up by Pathummi was true and there is no evidence that he knew it to be true until the Munsif's decree in that suit which was dated the 29th September 1900 ; and unless the plaintiffs be shown to have had knowledge earlier, the suit is within time. When it is doubtful at what precise time the fraud became known to the plaintiffs, the onus is on the defendant to show that the suit is out of time—*Rahimbhoy* v. *Charles Agnew Tanner.*[1] This burden the defendant has failed to discharge. We are, therefore, of opinion that the lower Courts were right in holding that this suit is not barred. On the facts found in the previous case and also in this case the conduct of the defendant must be held to have been fraudulent as he well knew that nothing was due when he executed the assignment and he went on himself collecting the subscriptions which fell due subsequently until the fraud collapsed owing to his own default. We accordingly dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

PRESENT:—Mr. Justice Boddam and Mr. Justice Munro.

Budruddin Sahib and another .. Appellants*

v. (*1st & 2nd Petitioners and 3rd & 4th Defendants*).

Abdul Rahim Respondent (*Respondent-Plaintiff.*)

Budruddin Sahib v. Abdul Rahim.

C. P. C., Ss. 244, 278, 283—Applicability of S. 244 — Party claiming attached property in his character as trustee—Appeal—Wakf—Decree directing sale of Wakf property.

S. 244 has no application to a case where the judgment-debtor or his representative asserts in execution that he holds the property attached in trust for some third person or body of persons or a religious charity or instuitution. The claim must be investigated under Ss. 278-283, C. P. C., and the order passed therein cannot be challenged by an appeal, but must form the subject of a separate suit.

A decree directing the sale of wakf property may in certain circumstances be perfectly valid.

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*A. A. A. O. No. 14 of 1907. 17th January 1908.

1. (1892) I. L. R 17 B. 341.

Budruddin Sahib v. Abdul Rahim.

Appeal from the decree of the District Judge of Tanjore in A. S. No. 383 of 1906 presented against the order of the Court of the District Munsif of Tiruvadi in E. P. No. 71 of 1906 in M. P. No. 1313 of 1905 (O. S. No. 203 of 1901).

G. S. Ramachandra Aiyar for appellants.

T. R. Venkatarama Sastri for the *Ag. Advocate-General* (*P. S. Sivaswami Aiyar*) for respondent.

The Court delivered the following

JUDGMENT:—The respondent obtained a decree for sale of certain property in a mortgage suit against the father of the appellants.

After decree, the defendant died and the respondent applied for leave to execute the decree against the appellants by sale of the land under S. 234, Civil Procedure Code. The appellants opposed the application on the ground that the land ordered to be sold was wakf property of which they were in possession not as representatives of their deceased father but as hereditary trustees of the property.

The District Munsif held that he could not go into the question under S. 244, Civil Procedure Code, on appeal. The District Judge also held that S. 244 did not apply, and if it did, he dismissed the appellants' appeal.

This second appeal is brought from this decision.

It is contended before us, that no appeal or second appeal lies as the appellants' only remedy is by preceeding under Ss. 278 to 283, Civil Procedure Code, and that S. 244 does not apply.

We think this contention is right. The appellants' objection is taken as trustees and in a different capacity to their position as representatives of their father, and in that capacity they are not within S. 244.

This is the result of the decision in *Murigeya* v. *Hayat Saheb*[1] where *Ranade* J. laid down the proper procedure as follows:—

"Where he asserts that he holds the property in trust for * * * * * some third person or body of persons or a religious charity or institution the claim must be investigated under the provisions of Ss. 278 to 283, and the order passed

1. (1898) I. L. R. 23 B 237.

therein cannot be challenged by an appeal, but must form the subject of a separate suit." See also *Ramanatham Chettiar* v. *Levvai Marakayar*[1] and *Kumaretta Servaigaram* v. *Sabapathi Chettiar.*[2]

Budrudin Sahib v. Abdul Rahim.

In this case there is no ground for holding that the decree is *ultra vires*. No question of public policy arises, for a decree for the sale of '*wakf*' property may in certain circumstances be perfectly valid. The cases cited, *viz.*, *Lakshumanaswami Naidu* v. *Rangamma*[3] and *Raja of Vizianagaram* v. *Dantivada Chelliah*,[4] therefore, do not apply.

We dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis and Mr. Justice Sankaran Nair.

Togaram Appadu Patnaidu .. Appellant* (*Plaintiff.*)

Togaram Venkata Ranga Rau and others .. Respondents (*Defts. and Legal Rep tves. of 3rd Defendant.*)

Appadu v. Venkata Ranga Rau.

C. P. C., S. 396—Final decree—No application necessary—Court competent to act 'suo motu'—Partition by metes and bounds—Lands not paying revenue to Government.

A suit for partition of lands not paying revenue to Government is to be considered pending on the file of the Court until there has been an actual division by metes and bounds under S. 396, C. P. C., and a final decree as contemplated by S. 396 is passed.

The Court is competent to pass the final decree for partition under S. 396, C. P. C., *suo motu* without an application by the parties for the purpose.

Appeal from the decree of the District Court of Ganjam at Berhampore in O. S. No. 18 of 1903.

K. R. Subrahmania Sastri for appellant.

E. V. R Sarma and *V. Ramesam* for 1st and 2nd respondent

P. Nagabhushanam for 5th respondent

The Court delivered the following

JUDGMENT :—We agree with the District Judge that the plaintiff has failed to prove the reunion after partition on which

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*A. No. 137 of 1904. 18th December 1907.

1. (1898) I. L. R. 28 M. 195.
2. (1906) I. L. R. 30 M. 26.
3. (1902) I. L. R. 26 M. 31.
4. (1904) I L. R. 28 M. 84.

Appadu v. Venkata Ranga Rau.

the suit is based. The decree in the former suit included land not paying revenue to Government and there has been no partition by metes and bounds effected under S. 396, Civil Procedure Code, so that the final decree contemplated by that section has not yet been passed.

Under these circumstances no question as to the execution of the decree has yet arisen and the District Judge is still bound to pass the final decree under S. 396 which he may do even without the application of the parties—*Mallikarjunadu Setti* v. *Lingamurti Pantulu and others*,[1] *Dwarka Nath Misser* v. *Barinda Nath*,[2] and *Latchmanan Chetty* v. *Ramanathan Chetty*.[3] As it is still open to the plaintiff to obtain his share in the joint family property in the former suit, we are clearly of opinion that it is not open to him to bring a fresh suit for the partition of the joint family property.

As regards the property which in the previous suit was found to be the self-acquisition of the plaintiff's father, the plaintiff has not sued in the present suit to recover his share of the succession and he cannot obtain any such relief in this suit.

In the result, we agree with the District Judge and dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis and Mr. Justice Sankaran Nair.

Annamalai Mudaliar .. .. Appellant* (*Petitioner, Assignee Decree-holder.*)

v.

Ramaier and others .. Respondents (*Defendants and Judgment-debtors.*)

Annamalai Mudaliar v. Ramaier.

Limitation Act, Art. 179, Cl. 4—Application in accordance with law—Step in aid of execution—C. P. C., S. 232—Application by the transferee-decree-holder to be recognized as such.

Where a Court received an application by the transferee-decree-holder for recognition as transferee and ordered the same, without returning it on the ground that it was not in accordance with S. 232, C. P. C., and there was no appeal from the order, *held* that the application was an application in accordance with law and that a

1. (1902) I. L. R. 25 M. 277.
2. (1895) I. L. R. 22 C. 425.
3. (1904) I. L. R. 28 M. 129.

Annamalai Mudaliar v. Ramier.

subsequent application for execution within 3 years from the date of the original application was not barred.

Obiter :—An application by the tranferee-decree-holder for the mere recognition by court as transferee is a step in aid of execution.

Appeal from the Order of the Subordinate Judge's Court of Negapatam in C. M. P. No. 241 of 1904 in O. S. No. 23 of 1900.

T. Narasimhaiyangar for appellant.

T. V. Seshagiri Aiyar for respondents.

The Court delivered the following

JUDGMENT :—In this case, the appellant, a transferee-decree-holder, on the 2nd December 1901, presented a petition under S. 232, Civil Procedure Code, in which, after stating that he had obtained an assignment of the decree and that when recognised as transferee-plaintiff, he would have to obtain an order absolute and then file an execution petition, he prayed the Court to pass an order recognising him as assignee-plaintiff in the suit. It was ordered accordingly on the 5th July 1902. On the 11th March 1904, the appellant applied for an order absolute under S. 89 of the Transfer of Property Act, but the lower Court held the application to be barred as more than 3 years had elapsed since the date of the decree (5th August 1900) and the application of the 2nd December 1901 was not, in the opinion of the Court, an application to take a step in aid of execution in accordance with law within the meaning of Cl. 4 of Art. 179 of the 2nd Schedule to the Indian Limitation Act. We are unable to agree with this conclusion. The petition, as appears from its terms, was intended as a step in aid of execution as it sought the recognition by the Court of the petitioner's right to execute the decree, which recognition it was open to the Court to grant, or withhold. The question then arises : Was it an application in accordance with law ? It is no doubt true as pointed out by *Sir Bhashyam Aiyangar* J. in *Ramachendra Aiyar* v. *Subramania Chettiar*[1] that S. 232, Civil Procedure Code, does not provide for any application in this form but contemplates that the transferee should apply for execution of the decree without any preliminaries of this kind, merely giving notice of the application to the transferor and the judgment-debtor. Consequently, when instead of applying for execution the appellant put in his application for recognition as

1. (1903) 14 M. L. J. 393.

Annamalai Mudaliar v. Ramier.

transferee, the Court might have returned the petition to him for amendment as not in accordance with the section. Instead of doing this, the Court made the order prayed for and the appellant did not appeal against it as he might have done. Under these circumstances, the application must be taken to have been in accordance with law. It was clearly a step in aid of execution, and, as it must be taken to have been in accordance with law, the present application is not barred. We may also observe that it has recently been held in *Pitam Singh* v. *Tota Singh*[1] that an application for recognition by a transferee-decree-holder is an application to take step in aid of execution in accordance with law. We must, therefore, set aside the order of the lower Court and remand the case to it for disposal according to law. The respondents will pay the appellant the costs of this appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White, *Kt.*, Chief Justice, and Mr. Justice Wallis.

Vadappalle Narasimham	..	Appellant*
v.		(*Plaintiff*).
Dronamraju Seetharamamurthy and others	..	Respondents (*Defendants*).

Narasimham v. Seetharamamurthy.

T. P. A., S. 116—"Consent"—Holding over—Position of tenant holding over and his representatives—Representatives of tenant at sufferance trespassers—Limitation Act, Art. 139, 144—C. P. C., Ss. 281, 283—Res judicata.

S. 116 of the Transfer of Property Act which enables the lessor or his representatives by his assent to convert a tenant by sufferance into a yearly or monthly tenant does not enable him to convert the representative of a tenant by sufferance into such a tenant by a mere assent on his part, without the consent of such representative.

If a tenant by sufferance dies and his representative holds on, he holds as a trespasser.

[*Adimulam* v. *Pir Ravuthan*[2] referred to. *Krishnaji Ramachendra* v. *Antaji Pandurang*[3] distinguished.]

The representatives of a tenant by sufferance who enter after his death are not tenants within the meaning of Art. 139 of the Limitation Act; and a suit against them is governed by Art. 144.

An order passed under S. 281, C. P. C., is not conclusive against the judgment-debtor unless he is a party to the proceedings in which the order was passed.

1. (1907) I. L. R 29 A. 301. 2. (1885) I. L. R. 8 M. 424 at 427.
3. (1893) I. L. R. 18 B. 256.

An order under S. 281 C. P. C. cannot be taken advantage of by a person who was not a party to the proceedings. Narasimham v. Seetharamamurthy.

Second Appeal from the decree of the District Court of Vizagapatam in A. S. No. 41 of 1904 presented against the decree of the Court of the District Munsif of Yellamanchili in O. S. No. 212 of 1903.

K. Srinivasa Aiyangar and *S. Srinivasa Aiyar* for *V. Krishnaswami Aiyar* for appellant.

T. V. Seshagiri Aiyar and *K. Subrahmanya Sastri* for respondents.

The Court delivered the following

JUDGMENT:—This is a suit to recover certain lands which were held by one Sanyasi, the predecessor of defendants Nos. 2 to 6 under certain inamdars. The inamdars granted them to the defendants Nos. 8 and 9, the predecessors of the plaintiff. Subsequently to the grant, Sanyasi attorned to the grantees and on the 7th January 1884 executed a kadappa Exhibit *M* in their favour by which he undertook to hold the lands under them at a yearly rental for three years until the close of the year Vijaya, April 1887.

The kadappa further provided that although he should conduct himself properly for three years according to the cowle he should obtain a fresh cowle at the end of the three years.

In 1887, the Government resumed the inam and Sanyasi then attempted to get Government to grant him a patta for the lands at the full assessment, but the 8th and 9th defendants put in a petition alleging that he was only a ryot cultivating under them, and ultimately Government ordered the patta to be issued to defendants Nos. 8 and 9—Exhibit *T*, dated the 20th July 1888. Sanyasi, however, did not pay any rent subsequent to the end of the year Vijaya (April 1887) and died in 1889, when defendants Nos. 2 to 6 are found to have entered as his representatives. Nor was any rent paid subsequently down to the institution of the suit in 1903.

In these circumstances, both the lower Courts have held that the suit was barred as at the expiry of the term limited by Exhibit *M*. Sanyasi became a tenant by sufferance and defendants Nos. 2 to 6 who are found to have entered on his death cannot be regarded as deriving any interest from him but must be regarded

Narasimham v. Seetharamamurthy.

as mere trespassers holding adversely to the plaintiff and his predecessors. In this Court it has been urged that Exhibit *M* not having been executed by the lessor was not a valid lease for three years under the provisions of the Transfer of Property Act, and that Sanyasi did not in law hold under it, but must be regarded as having become a tenant from year to year. This point was not raised in the lower Courts and we cannot now assume that there was not a registered counter-part executed in his favour by the defendants Nos. 8 and 9. Assuming that Sanyasi held for three years, and on the expiry of the term became a tenant at sufferance, we think the view taken in the lower Courts is right. There is no evidence of any assent on the part of the landlord during Sanyasi's life which could have converted him from a tenant at sufferance into a tenant in the sense of the term either at will or from year to year. At Common Law, the landlord's assent converted a tenant at sufferance into a tenant at will, but the inconveniences of this tenure to both sides disposed the Courts readily to construe tenancies at will as tenancies from year to year. In *Right* v. *Darby*[1] Lord *Mansfield* laid it down that "if there be a lease for a year, and by consent of both parties the tenant continue in possession, the law implies a tacit renovation of the contract." In England this is apparently a presumption, vide *Dougal* v. *McCarthy*.[2] But in most of the American States it is now held that a tenant, who holds even after his term has expired, may be treated by the lessor as a tenant from year to year or a trespasser at his option, but the tenant cannot elect in which capacity he should be regarded, *vide* American Notes XV Ruling cases at pp. 541 and 594, and the rule appears to have been laid down as broadly in *Sayaji Bin Habaji Bhadvalkar* v. *Umaji Bin Sadoji Ravut*[3], before the passing of the Transfer of Property Act. Under S. 116, which in our opinion points the rule which is *prima facie* applicable even in cases not coming under the Act where a lessee holds over and the lessor or his representative accepts rent or otherwise assents to the tenant continuing in possession, the lease is, in the absence of a contract to the contrary, renewed from year to year or month to month as the case may be. But while at common law the lessor would by his assent convert a tenant by sufferance into a tenant in the true sense of the term

1. (1786) T. R. 159.
2. (1893) 1 Q. B. D. p. 736.
3. (1866) 3 Bom. H C. R. A. C. J. p. 27.

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he could not by his mere assent convert the representatives of a tenant by sufferance who are mere trespassers into tenants without their own consent; and S. 116 of the Transfer of Property Act which enables the lessor or his representative by his assent to convert a tenant by sufferance into a yearly or monthly tenant does not enable by his mere assent to convert the representatives of a tenant by sufferance into such a tenant. It is, therefore, unnecessary to consider the evidence of the assent by the lessor after the death of Sanyasi, the alleged tenant by sufferance which has been relied on by the plaintiff. The statement made *Obiter* in *Adimulam* v. *Pir Ravuthan*[1] that "if a tenant by sufference dies and his representative enters and holds on, he holds as a trespasser" is, in our opinion, in accordance with all the authorities on the subject, and in the present case the facts negative any implication that a tenancy was subsequently created by consent of both sides. The decision in *Krishnaji Ramachandra* v. *Antaji Pandurang*[2] which has been relied on by the appellant is, in our opinion, distinguishable, and we may further observe that this decision has been dissented from in *Kantheppa* v. *Sheshеppa*[3] and in *Chandri* v. *Daji Bhau*.[4] Although the possession of a tenant by sufferance is not at common law adverse to the landlord, (see Notes to *Taylor* v. *Horde*[5]) still as held in the two cases last mentioned, and according to the view expressed in *Seshamma Shettati* v. *Chickaya Hegade*,[6] in a suit by a landlord to recover possession from a tenant for a term of years, time begins to run under Art. 139 of the Limitation Act, from the expiry of the term which must be held to be the time when the tenancy is determined within the meaning of the article; and the decision in *Adimulam* v. *Pir Ravuthan*[1] can, in our opinion, be no longer treated as good law. Art. 139 of the Limitation Act, however, deals with suits to recover possession from a tenant, that is to say, a person who was a tenant until his tenancy determined. The representatives of a tenant by sufferance who enter after his death cannot, in our opinion, be said to have ever been tenants within the meaning of Art. 139, and a suit against them would appear to fall within Art. 144. Even so, the present suit is barred as the defendants Nos. 2 to 6 entered in 1889, and the present suit was not instituted until 1903.

1. (1885) I. L. R. 8 M. 424 at 427.
2. (1893) I. L. R. 18 B. 256.
3. (1897) I. L. R. 22 Bom. 893.
4. (1900) I. L. R. 24 Bom. 504.
5. (1752) 2 Sm. L. C. P. 559 10th Edition.
6. (1902) I. L. R. 25 M. 507 at p. 511.

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One more point remains to be considered. In 1896 the suit lands were attached in execution for a decree against defendants Nos. 8 and 9; and defendants Nos. 2 to 6 put in a claim petition which appears from exhibit *D*, an extract from the Miscellaneous Petition, to have been dismissed. Defendants Nos. 2 to 6 did not sue within the year, and on this ground the District Munsif held that they were debarred from asserting their right to the property in the present suit, but the District Judge overruled this contention, we think rightly, on the ground that it is not shown that the judgment-debtors, defendants Nos. 8 and 9 were parties to the proceedings in which the order (Exhibit *D*) was passed. It has been held in ***Guruva*** v. ***Subbarayudu***[1] and ***Moiden Kutti*** v. ***Kunhi Kuttiali***[2] which was approved by F.B. in ***Krishnaswami Naidu*** v. ***Somasundaram Chettiar***[3] that an order passed under S. 281 is not conclusive as against the judgment-debtor, unless he is a party to the proceedings in which the order was passed. If, therefore, the order in Exhibit *D* had been in favour of the defendants Nos. 2 to 6 they could not have pleaded it successfully in the present suit against the plaintiff as his predecessors, the judgment-debtors, defendants Nos. 8 and 9, were not parties to the proceedings in which the order was passed. It is contended, however, that though the defendants Nos. 2 to 6 could not under these circumstances have taken advantage against the judgment-debtors of an order passed on their claim, still under the words of S. 283 an order made against them must be held to be conclusive as between them and the judgment-debtors, even though the latter were not parties. No authority has been cited in support of this contention which is opposed to the decision in ***Jagan Nath*** v. ***Ganesh***[4] and was, in our opinion, rightly rejected. In the result, the second appeal must be dismissed with costs.

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1. (1890) I. L. R. 13 M. 366.
2. (1902) I. L. R. 25 M. 721.
3. (1906) I. L. R. 30 M. 335.
4. (1896) I. L. R. 18 A. 413.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller and Mr. Justice Munro.

M. Tuppan Nambudri .. Petitioner*
v. (*Defendant.*)
V. P. Chinna Pari Kutti .. Respondent
(*Plaintiff.*)

Mortgage—Construction—T. P. A., S. 76—" Contract to the contrary."

Tuppan Nambudri v. Chinna Pari Kutti.

A mortgage deed ran in the following terms :—" In consideration of an advance of Rs. 795-8-0 the mortgagee is to hold possession, for 12 years, of land yielding a *pattam* of 80 paras of paddy and Rs. 40 and is to pay a *purappad* of 12 paras of paddy and 12 fanams and 50 cocoanut leaves 'having deducted interest and Government revenue.' "

Held, that there was no contract to the contrary within the meaning of S. 76, T. P. A., and that the burden of an enhancement in the Government revenue fell upon the mortgagee.

The mortgagee should *prima facie* bear the burden of an enhanced assessment, and it is on the mortgagee to prove a contract to the contrary in order to escape liability.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Subordinate Judge's Court of South Malabar at Calicut in S O. S. No. 510 of 1906.

The question in the case was whether, on the construction of a mortgage deed the mortgagor or the mortgagee was bound to pay the amount of enhancement in the kist. The material portion of the deed appears in the judgment.

K. R. Subrahmanya Sastri for appellant.

C. V. Anantakrishna Aiyar for respondent.

K. R. Subrahmanya Sastri :—The mortgagee is liable to pay the enhanced assessment—L. P. A. 41 of 1906 ; S. A. 525 of 1905; see also C. R. P. 218 of 1907. In this case the interest is not fixed, and therefore, it is distinguishable from C. R. P. 218 of 1907. Government revenue payable was also a fixed amount in C. R. P. 218 of 1907. C. R. P. 84 of 1905 is against me, but that is the decision of a single Judge. Mr. Justice *Moore* does not consider the question in detail. S. 76 of the Transfer of Property Act is clear. The mortgagee has to pay in the absence of a contract to the contrary. C. R. P. 386 of 1903 is also against me. That is a case of landlord and tenant. The landlord was held liable to pay the enhanced kist in S. A 1349 of 1904—a decision of *Benson* J. It seems to have turned upon the construction of the document.

C. R. P. No. 175 of 1907. 29th November 1907.

Tuppan Nambudri v. Chinna Pari Kutti.

Kamaya Naik v. *Rudra Naik*[1] is also against me. There, it is assumed that the mortgagor is liable and the mortgagee is entitled to tack on the amount to his charge. Again, if the mortgagee was liable the question can be raised only in a suit for redemption.

C. V. Anantakrishna Aiyar for respondent.—C. R. P. 15 of 1904; and C. R. P. 218 of 1907 are a in my favor. I submit there is a contract to the contrary in this case. The gross rent was fixed; the balance of *purappad* was fixed. Kist was an ascertained sum and consequently the interest too. S. A. 525 of 1905 merely reiterates the section and calls the attention of the lower Court to S. 76, T.P.A. That case is not against me. L.P.A. 41 of 1906 is to the same effect and merely reiterates the section. The words 'Government revenue' do not occur in the *kychit* at all. The gross yield was not fixed in that case.

The Court delivered the following

JUDGMENT :—The material conditions in the *kanom* now in question may be summarised as follows :—In consideration of an advance of Rs. 795-8-0 the mortgagee is to hold possession, for 12 years, of land yielding a *pattam* of 80 paras of paddy and Rs. 40 and is to pay a *purappad* of 12 paras of paddy and 12 fanams and 50 cocoanut leaves "having deducted interest and Government revenue."

The revenue having been increased at the recent settlement, the question is whether the difference between the old and the new is to be paid by the mortgagee or by the mortgagor.

It is conceded that the provisions of S. 76 of the Transfer of Property Act are to be applied to this case, but contended that the *kanom* "contains a contract to the contrary" within the meaning of that section so as to relieve the mortgagee of the payment of any taxes which were not payable at the commencement of the period covered by the *kanom*.

Mr. *Anantakrishnaiyar's* argument amounted to this:—The *pattam* and the *purappad* are fixed; the *nigudi* was known when the contract was entered into, and the balance of *pattam* after payment of *purappad* and *nigudi* is reserved for interest. The contract does not contemplate the cutting down of the interest, and therefore all payments over and above those provided for in the contract must be made by the mortgagor.

This argument assumes that the *pattam* is a constant factor, but the *pattam* seems to be merely an estimate and the amount

1. (1896) I. L. R. 22 B. 440.

realised by the mortgagee will, of course, vary directly with the annual yield of the land. It is quite clear that the contract does not provide for a reduction of *purappad* in the event of a failure of crop, and it cannot bind the Government to reduce the *nigudi* in a like event. Consequently, in the contemplation of the contract, if a failure of crop reduces the *pattam*, the loss must necessarily fall on the interest, the whole fund being *ex hypothesi* divided among *purappad*, interest and *nigudi*, and so, if in consequence of a rise in prices or a good season, the *pattam* increases in value, the increase will go to benefit the mortgagee unless it be wholly or partially absorbed by an increase in the *nigudi*.

Neither *nigudi* nor interest is stated in the contract as a fixed sum, and both are lumped together as sums to be deducted by the mortgagee before paying his *purappad*.

The amount of the *nigudi*, like the *pattam*, is beyond the control of either party to the contract, and if the contract contemplates a possible fluctuation in the interest, why should it not also contemplate a fluctuation in the *nigudi*? There seems to us to be nothing in the contract to negative the conclusion that such a fluctuation was contemplated, and, if that is so, the burden of the fluctuation must fall on the mortgagee; there is no contract to the contrary. But even in the view that the contract was not intended by the parties to provide for fluctuation either in *pattam* or *nigudi* (and that is perhaps the common sense view of the matter), still there is nothing to throw on the mortgagor the burden of providing the increase in the *nigudi*—no contract contrary to the rule laid down in S. 76.

It is not necessary to discuss the various unreported cases cited before us; each decision depends upon the construction of the contract with which it deals, but some of the decisions seem to go rather far, almost, indeed, to the length of requiring the mortgagor to prove a contract in his favour. The law requires the mortgagee to bear the burden, if he is not relieved of it by his contract, and he is not so relieved here.

The lower Court's decision is reversed and the suit dismissed with costs throughout.

[But see *Krishnaier* v. *Arappuli Iyer*.[1]—ED.]

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1. (1904) 14 M. L. J. R. 488.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
(*FULL BENCH*).

Present :—Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Wallis and Mr. Justice Miller.

Saravana Pillai and others .. Appellants*
(*Defts. Nos.* 1 *to* 3).

v.

T. Sesha Reddi .. Respondent
.. (1*st Plaintiff*).

Saravana Pillai v. Sesha Reddi.

C. P. C., S. 574—Judgment not in accordance with the section—Appeal—Practice—Procedure.

Where there has been a failure by the appellate Court to comply with the requirements of S. 574, C. P. C., the proper form of the order to be made by the second appellate Court is to set aside the decree and remand the case to the first appellate Court for disposal according to law. If the judge of the first appellate Court happens to be the same individual who heard the appeal originally, he need rehear the appeal, only if he is of opinion that he cannot properly dispose of it without a rehearing; and where he is not the person who originally heard the appeal, he should always rehear it.

Second Appeal from the decree of the District Court of Chingleput in A. S. No. 533 of 1904, presented against the decree of the Court of the District Munsif of Chingleput in O. S. No. 252 of 1902.

This second appeal coming on first for hearing before Mr. Justice *Boddam* and Mr. Justice *Sankaran Nair*, their Lordships made the following

† ORDER OF REFERENCE TO A FULL BENCH.—When in second appeal, it appears that the judgment of the lower appellate Court does not substantially comply with the requirements of S. 574 of the Civil Procedure Code, the question arises whether the judgment must be reversed and the case sent back for disposal according to law, as in *Sitarama Sastrulu* v. *Suryanarayana Sastrulu*[1], or whether the case should only be sent back to the Judge who decided the case in order that he may comply with the requirements of the section, as decided in *Kristna Reddi* v. *Srinivasa Reddi*[2], with which we agree. Having regard to the conflict in the decisions, we refer the above question to the Full Bench.

T. Rangachariar for appellants.

T. R. Krishnaswami Aiyar for respondent.

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* S. A. 958 of 1905. 29th November 1907.

† 10th October 1907.

1. (1898) I. L. R. 22 M. 12. 2. (1874) 5 M. H. C. R. 174.

Saravana Pillai v. Sesha Reddi.

The Court expressed the following

OPINION :—We are unable to agree with the judgment in *Kristna Reddi* v. *Srinivasa Reddi*,[1] if it is to be regarded, as would seem to have been the view of the learned judges by whom the present order of reference was made, as a decision to the effect that, when there has been a failure by the lower appellate Court to comply with the requirements of S. 574 of the Code of Civil Procedure, the only course open to this Court in second appeal is to send back the case to the judge who heard the appeal, and that, when this is impracticable, no further action can be taken.

We are of opinion that the proper form of order is that which, in recent years, has, we believe, been almost invariably adopted by this Court, namely, an order setting aside the decree and remanding the case to the lower appellate Court to be disposed of according to law—see, for instance, the orders in *Kunhi Marakkar Haji* v. *Kutti Umma*[2], and *Sitarama Sastrulu* v. *Suryanarayana Sastrulu*[3]. This would seem to be in accordance with the present practice of the Calcutta and Bombay High Courts—see *Rami Deka* v. *Brojo Nath Saikia*[4], *Bhagavan* v. *Kesur Kuverji*,[5] and *Ramchandra Govind Manik* v. *Sono Sadashiv Sarkhot*[6]—although, in the last mentioned case, there was no formal order setting aside the decree.

If the judge of the Court to which the case is remanded, is the judge who heard the appeal in the first instance, and if he considers that he can properly dispose of the remanded case without a rehearing of the appeal, the writing of a judgment which satisfies the requirements of S 574, without rehearing the appeal, would, in our opinion, be a compliance with the order that the case be disposed of according to law. But, in all cases where the judge of the Court to which the case is remanded, is not the judge who heard the appeal in the first instance, and in all cases where the judge of the Court is the judge who heard the appeal in the first instance, but he does not consider that he can properly dispose of the remanded case without a rehearing of the appeal, a rehearing is necessary in order that there may be a

1. (1874) 5 M. H. C. R. 174.
2. (1897) I. L. R. 20 M. 496.
3. (1898) I. L. R. 22 M. 12.
4. (1897) I. L. R. 25 C. 97.
5. (1892) I. L. R. 17 B. 428.
6. (1894) I. L. R. 19 B. 551.

compliance with the order of this Court that the case be disposed of according to law.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice and Mr. Justice Sankaran Nair.

Narayanaswami Naick and others .. Appellants* (*Defts.* 2 *to* 4).

v.

Seshama Raju .. Respondent (*Plaintiff*).

Narayanaswami Naick v. Seshama Raju.

C. P. C., S. 234—Hindu Law—Decree debt—Sons brought on record as representatives of deceased father pending suit—Decree, form of.

Where the sons of a Hindu father are brought on the record in a pending suit against the father as his legal representatives, the decree to be passed as against them should only be in their representative capacity, *i. e.*, that the amount of the decree should be recovered from them only from the estate of the deceased father in their hands.

[*Periasami Mudaliar* v. *Seetharama Chettiar*[1] approved.]

Second Appeal from the decree of the Subordinate Judge's Court of Negapatam in A. S. No. 217 of 1904 presented against the decree of the Court of the District Munsif of Tiruturaipoondi in O. S. No. 277 of 1902.

The Ag. Advocate-General (*P. S. Sivaswami Aiyar*) for appellants.

R. Shadagopachariar and *V. Venkatachariar* for respondent.

The Court delivered the following

JUDGMENT:—We think the law is correctly stated in the opinion expressed by Sir *Bahshyam Aiyangar* in his judgment in the Full Bench case of *Periasami Mudaliar* v. *Seetharama Chettiar.*[1] The sons of the deceased having been brought on the record in their character of personal representatives of the deceased, the decree should be against them as personal representatives, the amount of the decree to be realised from the estate of the deceased in their hands. It has been contended that the form of the decree adopted by the lower appellate Court may be upheld on the ground that the debt incurred by the deceased defendant is a family debt. There are two answers to the contention. The

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*S. A. No. 88 of 1905. 20th December 1907.

1 (1903) I. L. R. 27 M. 243 at 248.

Narayanaswami Naick v. Seshama Raju.

question cannot be gone into in this suit since the defendants Nos. 2, 3 and 4 were brought on the record in their representative capacity. Further, the 2nd defendant was relieved from the liability by the decree of the lower appellate Court and there has been no appeal against this.

We allow the appeal, set aside the decree of the Subordinate Judge and restore that of the Munsif.

The parties will pay their own costs in this Court and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Wallis.

Vadlamannati Venkataramiah Pantulu .. Appellant* (*Petitioner-1st Plaintiff*).

v.

Sri Rajah Venkatarangiah Appa Rau Bahadur Zamindar Garu .. Respondent (*Respondent-Defendant*).

Madras Acts—Rent Recovery Act—Patta, tender—Transfer by old tenant—Bona-fide dispute.

Venkatramiah v. Venkatarangiah.

A person claiming to have a patta tendered to him as transferee from a tenant is, no doubt, bound, if called on, to produce the transfer-deed for the Zamindar's inspection in proof of his claim; but if it is not apparently in order, and if, after notice, which it is the Zamindar's duty to give to the old tenant, the latter does not contest the validity of the transfer, it is the duty of the Zamindar to grant a pattah to the new tenant. The rule that the landlord cannot refuse to grant the pattah to the old tenant on the ground of transfer must be confined to cases where there is a *bona-fide* dispute as to the transfer between the old and the new tenants.

[*Orr* v. *Rakkumarathi*[1] explained.]

Appeal under S. 15 of the Letters Patent against the order of Mr. Justice *Boddam* in C. R. P. No. 542 of 1906 presented against the decree of the Subordinate Judge's Court of Kistna at Ellore in S. C. S. No. 1955 of 1905.

P. Nagabhushanam for appellant.

V. Ramesam for respondent.

The Court delivered the following

JUDGMENT:—In this case the Subordinate Judge of Kistna at Ellore dismissed the plaintiff's suit without taking evidence

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* L. P. A. 25 of 1907. 11th November 1907.

1. (1905) I. L. R. 29 M. 83.

Venkataramiah v. Venkata Rangiah.

apparently on the ground that on the admitted facts, the plaintiff had no cause of action. The suit was brought to recover damages for the wrongful attachment of the plaintiff's crops for arrears of rent and the plaintiffs alleged that they were the persons to whom the tender of pattah ought to have been made because the rights of the previous tenants had been transferred to them before the beginning of the fasli, and that they had frequently called upon the defendant to tender a pattah to them. The defendant pleaded that there had been a good tender to the previous tenants, and whilst not denying the alleged transfer nor averring that there was any dispute about it, pleaded in paragraph 6 of the written statement, that the plaintiffs in answer apparently to an application for a pattah, had been informed that on production of the sale certificates and other instruments of transfer, their names would be entered in the village accounts and a pattah granted, but they had failed to produce them. It was the duty of the plaintiffs to produce the documents of transfer and get the names of the former pattadars removed, and the plaintiffs' names entered in the accounts. In this state of the pleadings, the Subordinate Judge dismissed the plaintiff's suit without taking evidence, holding, on the authority of *Orr* v. *Rakkumarathi*[1], that a landholder could not of his own authority and without being moved by the registered tenant recognize a third party as tenant and grant a pattah to him, and that until so moved the landholder was entitled to go on tendering pattahs to the registered tenant. All that is decided in *Orr* v. *Rakkumarathi*[1], is, that where there is a *bona fide* dispute as to the transfer of the tenancy the landlord cannot refuse to grant a pattah to the old tenant on the ground of such transfer until the new tenant has established his right to recognition in a Court of law. The rule so laid down does not rest on any statutory basis, but in accordance with the custom of the country, and in conformity with the practice of Government as to transfers of ryotwari holdings. The rule must, however, in our opinion, be confined to cases where there is a *bona fide* dispute between the old and new tenants. A person claiming to have a pattah tendered him as transferee from a tenant is no doubt bound, if called on, to produce the transfer deed in his favour for the Zamindar's inspection in proof of his claim, but if it is not apparently in order and if, after notice, which it is the Zamindar's duty to give, the old tenant

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1. (1905) I. L. R. 29 M. 83.

does not contest the validity of the transfer, it is, we think, the duty of the Zamindar to grant a pattah to the new tenant, even though there is no petition from the old tenant asking him to recognise the transfer. Under these circumstances, we think the Subordinate Judge was wrong in dismissing the plaintiff's suit without taking evidence and recording findings, and we accordingly set aside his decree and remand the case to him for disposal according to law. The costs in this court will abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Miller.

Erat Madhavan Mannadi .. Appellant* (*Petitioner-1st Defendant.*)

v.

Venganat Swarapa Hil Ravi Varma alias The Valia Nambidi styled Rajah and another. .. Respondents (*Counter-Petitioners Plaintiff's assignee & Plaintiff's heir.*)

C. P. C., Ss. 544, 583, 111—Set off in restitution—Equitable relief—Accounts taking of—He who seeks equity must do equity.

Defendant took a lease from one *Z* in 1882. Plaintiff took another lease from *Z's* successor in 1890. The plaintiff sued the defendant and his lessor's then representative for a declaration that the lease to defendant was invalid and for possession. Plaintiff obtained a decree for possession on condition of his paying a certain amount as compensation to the defendant. The defendant delivered possession on receipt of the compensation amount. The representative of the lessor, appealed from the decree making the defendant a party. The decrees of the lower Courts were upset by the High Court in August 1897.

Held, that under S. 544, C. P. C.. the reversal of the decree by the High Court enured to the benefit of the defendant also ; that the defendant was entitled to demand possession of the lands from the plaintiff by way of restitution ; that the refunding of the compensation amount by the defendant was not a condition precedent to his obtaining relief by way of restitution and that the defendant was entitled to ask that the amount may be adjusted by setting off mesne profits, which the plaintiff has wrongfully received against the compensation money, as on the date of the decree of the High Court.

Held, that it was not equitable that the defendant should be permitted in effect to postpone applying for restitution until mesne profits had amounted to a sufficient sum to wipe off the amount of the compensation money.

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* C. M. S. A. 30 of '07. 22nd January 1908.

Madhavan v. Valia Nambidi.

Appeal from the order of the District Court of South Malabar in A. S. No. 780 of 1905 presented against the order of the Court of the District Munsif of Alathur in E. P. No. 760 of 1905 (O. S. No. 437 of 1892, A. S. No. 135 of 1894 and S. A. No. 979 of 1895).

C. V. Ananthakrishna Aiyar for appellant.

The Acting Advocate-General (*P. S. Sivaswami Aiyar*) for 1st respondent.

The Court delivered the following

JUDGMENT :—For the purposes of the questions we have to determine in this appeal, the facts are these.

In 1880, the 1st defendant obtained a lease of certain property from Zamorin No. 1.

In 1892, Zamorin No. 2, the successor of Zamorin No. 1, granted a lease of the same property to the plaintiff.

The plaintiff filed a suit against the defendant and Zamorin No. 3, who had succeeded Zamorin No. 2, to obtain a declaration that the lease to the defendant by Zamorin No. 1. was invalid. The Court of first instance declared the lease to be invalid and gave the plaintiff a decree for possession subject to the payment of a certain sum to the defendant as compensation for improvements. The defendant did not appeal against the decree, and in March 1895, he was paid the compensation money and gave up possession. The Zamorin appealed to the lower appellate Court on the question of the validity of the lease making the defendant a respondent to the appeal. This appeal was dismissed. The Zamorin then preferred a second appeal to this Court making the defendant a respondent, and this Court, in August 1897, held that the lease to the defendant by Zamorin No. 1. was valid and dismissed the plaintiff's suit. In March 1898 Zamorin No. 3 recovered the arrears of rent of the land in question from 1893 to 1898 from the plaintiff. Upon the decree of the High Court being passed, a creditor of the defendant sought to attach any right by way of restitution which the defendant might have. In January 1901, this Court held, on second appeal, that the creditor was not entitled to an order of attachment. The defendant has not

refunded the compensation money and has not yet asked to be restored to possession He contends that he is entitled to have the mesne profits which the plaintiff has enjoyed during the time he has been wrongfully in possession of the property set off against the compensation money and he says that he intends to apply for possession if the balance should be in his favour. The lower appellate Court held that the defendant was entitled to an order by way of restitution, but that he was not entitled to mesne profits since the date of the High Court decree dismissing the plaintiff's suit—August 1897—since on that date there was nothing to prevent him from refunding the compensation money and asking for possession and there was no objection for the plaintiff to surrender the property until the compensation money had been refunded.

The questions are :—Is the defendant, in the circumstances, entitled to any order by way of restitution, and if so, on what footing is the account to be adjusted ?

The first point argued was whether under S. 544 of the Civil Procedure Code the decree of this Court of August 1897 enured for the benefit of the defendant, notwithstanding the fact that he had not appealed against the decree of the Court of first instance and had accepted the compensation money awarded to him by that decree. The arguments of the Advocate-General that the section did not apply were largely based on the assumption that the defendant appealed upon the question of the amount of compensation without appealing on the question of the validity of the lease to him. It appears, however, that the defendant did not appeal at all to the lower appellate Court. He was a party to the Zamorin's appeals, and we think these appeals were against decrees which proceeded on a ground common to the Zamorin and the defendant within the meaning of the section. In our opinion, therefore, the decree of the High Court enured for the benefit of the defendant.

This being our view, it is not necessary to consider whether this question is *res-judicata* by virtue of the decree of this Court in A. A. A. O. No. 41 of 1899, with reference to the rights of the defendant's creditor by way of attachment.

As regards the lease to the defendant of 1880 (Exhibit *XIV*) there is nothing on the face of the document to indicate that the term expired by effluxion of time in 1892, and the fact that Zamorin

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No. 3 accepted arrears of rents for the land in question from the plaintiff in 1898, the defendant being no party to this arrangement, did not, in our opinion, determine the tenancy.

We do not think that the refunding of the compensation money by the defendant was a condition precedent to his obtaining relief by way of restitution. The plaintiff has been wrongfully in possession, and he has been enjoying the profits of the land of which he has been wrongfully in possession. The defendant is entitled to possession under his lease of 1880, which has never been determined, and, in our opinion, he is entitled to ask that the account may be adjusted by setting off mesne profits against the compensation money. The question remains, in the taking of the account for the purpose of ascertaining the sum to be credited to the defendant by way of restitution, is he entitled to be credited with the mesne profits up to the date of his application or only up to August 1897?

The relief which the defendant claims is in the nature of equitable relief, and it does not seem to us to be equitable that he should be permitted for his own convenience, because at the time his right to relief arose, *i.e.*, in August 1897, he was unable or unwilling to refund the purchase money, to postpone applying for the relief until the mesne profits had amounted to a sufficient sum to wipe off the amount of the compensation money. In seeking equity it was for him to do equity. In August 1897 he was entitled to restitution in the shape of the mesne profits received by the plaintiff from the time he had been wrongfully in possession up to that date, and he was liable to refund the purchase money.

We think the accounts should be adjusted on the footing that the defendant had done what, in our view, he ought to have done, *viz.*, applied for restitution on the dismissal of the plaintiff's suit by the High Court in August 1897 notwithstanding the attachment proceedings to which reference has been made. The defendant's contention amounts to this: that he is entitled for his own convenience to wait an indefinite period before seeking to enforce his equitable right. This contention does not commend itself to us, and we do not think it should be given effect to.

We dismiss the appeal with costs and also the Memorandum of Objections with costs.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Present:—Lord Robertson, Lord Collins and Sir Arthur Wilson.

Raja Pramada Nath Roy .. Appellant.*

v.

Raja Ramani Kanta Roy and others .. Respondents.

Pramada Nath Roy v. Ramani Kanta Roy.

Bengal Tenancy Act, S. 188—Suit by one of several co-sharer landlords for entire rent—Right to receive his own share separately—Contract express or implied—Other sharers made defendants.

It is a general rule that a sharer whose co-sharers refuse to join him as plaintiffs can bring them into the suit as defendants and sue for the whole rent of the tenure.

An agreement either expressly proved or implied by the conduct of the parties may establish the right of one of several co-sharer landlords to sue separately for the shares of rent receivable by the separate share-holders, but such an agreement, either express or implied, merely affects the right to sue separately for rent, and in no other respect modifies the terms of the holding, *e. g.*, the right of a sharer to bring the tenure to sale for arrears of rent or the right of one sharer to sue, making his co-sharers defendants when they will not join as plaintiffs.

The filing of a suit is not a thing which the landlord is, under the Bengal Tenancy Act, required or authorized to do. It is an application to the Court for relief against an alleged grievance, which the plaintiff is entitled to submit under the general law, and S. 188 of the Bengal Tenancy Act does not preclude a suit for the aggregate rent of the tenure with the other sharers as defendants.

Their Lordships' judgment was delivered by

Sir Arthur Wilson :—This appeal raises a question upon the construction and effect of the Bengal Tenancy Act, a short question, but one which may be of considerable importance wherever that Act applies.

The facts of the case are not in dispute, and are simple. In the year 1837, the then owner of the Zemindari interest in an 8 annas share in Dihi Haloti created a putni tenure in those 8 annas in favour of one Abbott, at a rent reserved. The Zemindari and the putni interests both underwent subsequent devolutions, and at the time which is now material, the present plaintiff (appellant) held 6 annas of the zemindari interest, respondents 14 and 15 held one anna, and respondents 2, 3 and 16 one anna. The putni interest was held by the remaining respondents and also by respondent 16. The last mentioned, therefore, was interested both in the zemindari and in the putni. The putni

*11th December 1907.

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rent fell into arrear so far as the share which should have come to the appellant was concerned.

The appellant thereupon brought the present suit on the 17th April 1900 in the Court of the Subordinate Judge of Rajshahye. He made the putnidars defendants, and he joined as co-defendants his co-sharers in the zemindari on the ground that they refused to join him as plaintiffs. The suit was framed as one under the Bengal Tenancy Act to recover the whole rent of the tenure, and for that purpose to bring to sale the tenure itself. But the plaint asked in the alternative for a decree for the plaintiff's share of the rent.

The Subordinate Judge refused to make a decree under the Bengal Tenancy Act for the whole putni rent, and gave a decree only for the plaintiff's share of the rent. On appeal, the case came before two judges of the High Court, *Ghose* and *Geidt* JJ., who differed in opinion, *Ghose* J. holding that the view of the Subordinate Judge was correct, *Geidt*, J. being of the contrary opinion. In consequence of this difference the case was referred to a third judge, *Brett* J., who agreed with *Ghose* J., with the result that the appeal was dismissed. Against that decision the present appeal has been brought, and it lies upon their Lordships to determine which of the views taken by the learned Judges ought to prevail.

Section 65 of the Bengal Tenancy Act enacts that :—

"Where a tenant is a permanent tenure holder * * * he shall not be liable to ejectment for arrears of rent, but his tenure or holding shall be liable to sale in execution of a decree for the rent thereof, and the rent shall be a first charge thereon."

S. 159 and the following sections provide the means and procedure for so bringing the tenure to sale, and for the cancellation of incumbrances thereon. The only other section which it is necessary to refer to is S. 188 which says that:—

"Where two or more persons are joint landlords, anything which the landlord is, under this Act, required or anthorized to do, must be done either by both or all those persons acting together, or by an agent authorized to act on behalf of both or all of them."

By the express terms of the Bengal Tenancy Act, in the event of rent being unpaid, the owners of the zemindari interest

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are entitled, by suit under that Act, to bring a putni to sale, with the consequences prescribed by the Act. And it is a general rule—a rule not derived from the Bengal Tenancy Act, but from quite another branch of law, namely, the general principles of legal procedure—that a sharer, whose co-sharers refuse to join him as plaintiffs, can bring them into the suit as defendants, and sue for the whole rent of the tenure. This must apparently be the law applicable to the present case, unless there be something to exclude the case from the operation of these general rules.

For the purpose of this exclusion, what was relied on was this: it was said that, by express or implied agreement between the zamindars and the putnidars, the shares in the putni rent of the several zamindars were to be paid, and so far as they were paid at all, were, in fact, paid separately; and it was contended that that agreement, on the one hand, entitled the separate zemindars to sue for their separate shares, and to bring to sale the right, title and interest of the putnidars, but on the other hand, either precluded the zemindars altogether from obtaining a decree under the Bengal Tenancy Act for the rent as a whole, or at any rate prevented one of the zemindars from doing so by making his co-sharers defendants.

This was the contention which prevailed with the Subordinate Judge and with two out of the three Judges in the High Court.

The evidence of the alleged agreement consisted of certain decrees, which seemed to show that the shares of the rent had been, from time to time, separately recovered. It has long been held in Bengal that agreement, either expressly proved, or implied by the conduct of the parties, may establish the right to sue separately for the shares of rent receivable by the separate shareholders; and their Lordships have no inclination to question that course of rulings.

But it has been equally clearly laid down in Bengal that such an arrangement, expressed or implied, merely affects the right to sue separately for rent, and in no other respect modifies the terms of the holding; and their Lordships think that is clearly a sound view of the law. And it appears to their Lordships to be sufficient ground upon which to decide this appeal, for it follows, from the propositions referred to, that

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the right to bring the tenure to sale for arrears of rent remains intact, and also the right of one sharer to sue, making his co-sharers defendants, when they will not join as plaintiffs.

It only remains to notice S. 188 cited above. It was suggested in argument that this section precludes a suit under the Act for the aggregate rent of the tenure, unless all those entitled to share in the rent join as plaintiffs. Their Lordships are not impressed by this argument. The filing of a suit is not a thing which the landlord is, under the Act, required or authorised to do. It is an application to the Court for relief against an alleged grievance, which the plaintiff is entitled to submit, not by reason of any provision of the Tenancy Act, but under the general law.

Their Lordships will humbly advise His Majesty that this appeal should be allowed, that the decrees of both Courts in India should be discharged, and that instead thereof it ought to be declared that the appellant is competent to bring a suit, under the Bengal Tenancy Act, for the whole rent due in respect of the property in suit, that the case ought to be remitted to the High Court to take the necessary steps for the disposal thereof on the footing of the above declaration, and that the respondents who defended this appeal to the High Court, ought to pay the costs thereof, and that the costs in the Court of the Subordinate Judge ought to be dealt with by that Judge on the above footing.

The respondents who defended this appeal will pay the costs of it.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Munro.

Chalavadi Kotiah and others .. Appellants* in both (*Counter-Petrs. Judgment-Debtors.*)

v.

Paloori Alamelammal and another .. Respndents in both (*Petitioners-Attaching Creditors.*)

Kotiah v. Alamelammal.

Limitation Act, Arts. 178, 179—Execution—When prior application to be considered pending.

*A. A. O. Nos. 16 & 17 of 1907. 13th December 1907.

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So long as the proceedings in execution initiated by the decree-holder are pending his right to apply for their continuance occurs from day to day, *i. e.* on every day on which the Court does not *suo motu* continue them. The right to apply for execution will not be barred till 3 years have elapsed after the proceedings have ceased to be pending.

An order "dismissing" an execution petition on the ground of stay of execution pending an appeal to the appellate Court is not a nullity, but, if passed without notice and in the absence of parties, it cannot be regarded as an order between the parties at all, but is merely a direction to the officer of the Court to remove the proceedings from the pending list. The execution petition itself should, under the circumstances, be considered as pending.

A decree-holder applied for execution on 3-10-'99. Objection was taken by the judgment-debtor that the debt was satisfied. On 31-10-'99 the Munsif disallowed the objection. The judgment-debtor appealed. There was an order by the appellate Court for stay of execution and the Munsif passed an order on 15-12-'99 —"Execution ordered to be stayed; petition dismissed." This order did not appear to have been passed after notice to the parties or in their presence. On 20-7-'00 the Appellate Judge reversed the order of the Munsif and remanded the petition for further enquiry and on 25-1-'01 the Munsif decided that the decree had been satisfied. On 11-12-'01 the District Judge on appeal reversed this order; on 29-10-'03 his decision was confirmed by the High Court. The present application for execution was presented on 9-7-'05. *Held* that, under the circumstances, the application of 3-10-'99 should be considered pending and that the present application was barred only so far as it was a fresh application for execution, *i.e.*, in so far as it asked for attachment of property not proceeded against in proceedings instituted by the application of 1899 and that in so far as it repeated what the application of 1899 prayed for, it was not barred.

Second Appeals from orders of the District Court of Guntur, in Appeals Nos. 36 and 37 of 1906, respectively, presented against the orders of the District Munsif's Court of Ongole in E. P. Nos. 609 and 610 of 1905, in O. S. No. 26 of 1893.

Dr. S. Swaminathan for appellants.

V. V. Srinivasa Aiyangar for respondents.

The Court delivered the following

JUDGMENT:—On the 3rd of October 1899, an application was made to execute the decree in O. S. No. 260 of 1893, by attachment and sale of certain immoveable property mentioned in the application. An order was obtained on the 7th October 1899. The judgment-debtor objected that the decree had been satisfied, but that objection was disallowed on the 31st October. The judgment-debtor appealed to the District Judge and obtained an order for stay of execution pending the hearing of the appeal. Upon this the District Munsif, on the 15th December 1899, passed

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the following order on the execution petition:—"Execution ordered to be stayed. Petition dismissed." On the same day, as a diary entry shews, the immoveable property was attached. The District Judge disposed of the appeal of the 20th July 1900, remanding the matter for further enquiry, and on the 25th January 1901, the District Munsif decided that the decree had been satisfied before the attachment. On 11th December 1901, the District Judge reversed this order, and on the 29th of October 1903, his decision was confirmed by the High Court.

The execution petition now under consideration was presented on the 9th July 1905; it asks for a notice under S. 248 of the Civil Procedure Code for the attachment of certain immoveable property, for the issue of a proclamation of sale of the property already attached, for the attachment of moveables, and for the arrest of the defendants.

The question for our decision is whether this petition is barred by limitation as held by the District Munsif, or not so barred as held by the District Judge in appeal from him. There is no doubt that when on the 11th December 1901, the District Judge reversed the District Munsif's order declaring the decree already satisfied, it was open to the decree-holder to proceed with the execution, and the fact that an appeal was preferred to the High Court presented no obstacle, no order for stay of execution having been obtained. It is impossible, therefore, to accede to the contention that limitation commences to run from the decree of the High Court, and the petition of the 7th July 1905 is clearly barred so far as it is a fresh application for execution, that is to say, so far as it asks for attachment of property not proceeded against in proceedings instituted by the application of the 3rd October 1899. In so far as it asks for a proclamation of the sale of the property already attached in pursuance of the petition of 1899, the case is different. For the appellant it is contended that the order of the 15th December 1899 dismissing the petition closed the proceedings, that the attachment closed with them, and the subsequent application is throughout a new petition for execution. If that be the true position, the respondents must fail not merely on the ground of limitation but also because they do not ask for attachment of the property previously attached. But that is not the position. There is nothing to show that the order of the

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15th December 1899 was passed after notice to either party. It is not stated in the order that either party was heard, and the diary entry does not indicate any hearing on the 15th December. It has been held in *Sasivarna Tevar* v. *Arulanandam Pillai*,[1] that the Court has no legal authority to dismiss a petition for execution simply because execution has been stayed, but if that is so, the order of dismissal is not necessarily ineffective to dispose of the proceedings. If wrong, an appeal might lie to set it right. But here, the order being made without notice, and in the absence of both parties, cannot be regarded as an order between the parties at all. It amounts to no more than a direction to officers of the Court to remove the proceedings from the pending list. (Cf. the case of *Narayan* v. *Sono*[2].) Indeed it appears not improbable that this is the view taken of the matter by the District Munsif himself, for the record contains no indication of any order to remove the attachment or for costs. However that be, the order had not the effect of closing the proceedings, and they must be considered to have been still pending when the application was made in 1905.

The question then arises, whether even in that view it was not necessary in order to save limitation to present the application within 3 years of the District Judge's order, dated the 11th December 1901. A number of cases have been cited in the bar in which applications similar to that in question have been treated as applications to revive or continue earlier proceedings, and in some of these cases, Article 178 of Sch. II of the Limitation Act is referred to as applicable to the matter, while in others no reference is made to any particular provisions of law. The cases establish the position that if the execution has been stopped by the interposition of some obstacle, the proceedings may be revived or "continued" by an application made within 3 years of the removal of the obstruction, and though in some cases, notably in the decision of the Privy Council in *Qamar-ud-din Ahmad* v. *Jawahir Lal*[3] the application is referred to as reviving a pending execution, it was not necessary in any of them to decide whether Article 178 ought to be applied to the case. It is not clear what course the proceeding took in *Narayan* v. *Sono*[2], whether execution was stayed pending the decision of the High Court in S. A. No. 133,

1. (1897) I. L. R. 21 M. 261. 2. (1890) I. L. R. 24 B. 345 at 349.
3. (1905) I. L. R. 27 A. 334.

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of 1892 or whether the Court of the First Appeal replaced the obstacle removed by the Court of First Instance. It seems to have been assumed on both sides that the obstacle was not removed until the date of the decision of the High Court and the petition under the consideration of the learned Judges was within 3 years from that date. No doubt, there is a remark in the judgment to the effect that there was no bar under Article 178, because the application was not " a fresh application for execution ; " but it is quite clear, as the report stands, what is the precise import of that remark, for, if the application is a fresh application for execution, it would *prima facie* be governed by Article 179.

There are, however, cases not cited before us from which we may derive the rule that Article 178 ought not to be applied when the Court is asked to do something which it is bound to do (see *Kylasa Goundan* v. *Ramasami Ayyan*[1] and *Vithal Janardan* v *Vithojirav Putlajirav*[2]) and that so long as proceedings are pending, limitation will not begin to run against an applicant (vide *Kedarnath Dutt* v. *Hurrachand Dutt.*[3]) In *Venkatappiah* v. *Jagannadha Rao*[4] an application made in 1898 was held to be made in proceedings instituted in 1886 still undisposed of in 1898 and so not barred, and that case is also an authority for the rule that, if in an execution petition a decree-holder asks for sale as well as attachment of the property of the judgment-debtor, a subsequent application for sale of the same property will not be barred by Article 178, though not made within 3 years of the attachment. The decision in *Joobraj Singh* v. *Buhooria Alumbasee Koer*[5] seems to proceed on the assumption that in that case a separate application for sale was necessary ; the question is not discussed.

It may be somewhat difficult to reconcile the view taken in *Kylasa Goundan* v. *Ramasami Ayyan*[1] with that taken in *Pichaippa Achari* v. *Poojali Seenan*[6] where it was held that an application for execution not as such in accordance with law, will suffice to save limitation if it contains an application for the issue of a notice under S. 248 of the Civil Procedure Code. The Court is by S. 248 directed to issue a notice and by S. 316 to order

1. (1881) I. L. R. 4 M. 172.
2. (1882) I. L. R. 6 B. 586.
3. (1882) I. L. R. 8 C. 420.
4. (1901) 12 M. L. J. 24.
5. (1880) 7. C. L. R. 424.
6. (1905) I. L. R. 28 M. 557.

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a certificate, and in neither case is any application required by the Code. If then an application for a notice is an application within the meaning of Article 179 it is not very easy to see why an application for a certificate is an application within the meaning of Article 178.

Possibly we are on safer ground if we hold with *Wilson* J. in *Kedarnath Dutt* v. *Harrachand Dutt*[1] that so long as the proceedings initiated by the decree-holder are pending, his right to apply for their continuance occurs from day to day, (*i.e*, on every day on which the Court does not *suo motu* continue them). The right to apply will then not be barred till 3 years have elapsed after the proceedings have ceased to be pending.

Whichever be the better view, the result is the same, and the petition under our consideration is not barred in so far as it asks for sale of the property attached under the petition of the 3rd October, 1899.

The decree of the District Judge must be modified accordingly. Execution must proceed only against the immoveable property described in the Execution Petition of the 3rd October 1899 (E. P. No. 1086 of 1899). The parties will bear their own costs throughhont.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir S. Subrahmanya Aiyar, Officiating Chief Justice, and Mr. Justice Russell.

Ramanuja Reddiar, minor, by his guardian Krishnammal .. Appellant* (*2nd Defendant*).

v.

Rangaswami Aiyangar and another . Respondents (*Plaintiffs*).

Ramanuja Reddiar v. Rangaswami Aiyangar.

C. P. C., Ss. 108, 157, 158—" Or make such other order as it thinks fit "—Pleader appearing and asking for adjournment—Refusal to adjourn—Pleader abstaining from the conduct of the case.—Whether ex-parte.

The latter part of S. 157, "or make such other order as it thinks fit" has no application to a case where the Court at once proceeds to trial and judgment.

The mere fact of a pleader appearing for a party and applying for an adjournment does not preclude the conclusion that the party, nevertheless, did not appear within the meaning of S. 157, or Ch. VII, C. P. C.

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* C. M. A. 180 of 1902. 18th October 1903.

1. (1882) I. L. R. 8 C. 420.

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Held also that where the pleader who appeared for a party and asked for an adjournment of the case, on the Court's refusal to adjourn, altogether abstained from taking any part in the examination of the witnesses or in the argument of the case, the party whom the pleader represented "failed to appear" within the meaning of S. 157, C.P C.

In cases where, on the Court refusing to adjourn a case, a pleader says that he has no instructions, it would be well explicitly to ascertain whether the pleader severs his connection with the case.

Appeal from the order of the District Court of Trichinopoly in C M. P. No. 542 of 1902 (O. S. No. 53 of 1901 on the file of the Subordinate Judge's Court of Trichinopoly.)

K. Jagannatha Aiyar for appellant.

V. Krishnaswami Aiyar and *N. Rajagopalachariar* for respondents.

The Court delivered the following

JUDGMENTS :—*Officiating Chief Justice* :—The facts of the case, so far as they are necessary for the present purpose, are as follows : - The plaintiffs, sons of one Singam Aiyangar, brought this suit against the first defendant and his son, the second defendant, a minor, for the recovery of Rs. 5,800 and odd stated to be due under a mortgage executed to Singam Aiyangar, by the first defendant. The second defendant set up that he had been adopted by the first defendant's uncle who was alleged to be entitled to a moiety of the property mortgaged, and contended that the mortgage was not binding on him to the extent of his interest in the land. After the settlement of issues, the case was adjourned to the 25th May 1901 for trial, on which date, however, the trial did not come off as there were negotiations for a compromise, and the case was adjourned to the 15th June. The first defendant then presented a petition praying that an issue be framed as to a compromise which, he said, had been entered into between himself and the plaintiffs, but which the plaintiffs were unwilling to act up to, and asked for postponement of the trial of the case. The second defendant's alleged adoptive mother, who was his guardian *ad litem*, applied through the second defendant's vakil for three week's adjournment, alleging that owing to negotiations for a compromise between the plaintiff and the first defendant according to which, as she understood, the second defendant was to be exonerated, she was not ready with the evidence to be adduced on his behalf. On the 18th June the suit

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was adjourned to the 26th idem; the language of the order, though recorded on each of the above petitions, being merely "adjourned to 26th June." On the 24th June, the second defendant's guardian *ad litem* presented a petition praying that two month's time be allowed to her to produce evidence on behalf of the second defendant. This petition came on for hearing on the 26th and was rejected. Upon such rejection, the Vakil, who till then appeared for the second defendant and who moved the application, informed the Court that he had no instructions in the case, and abstained from taking any part in the proceedings which took place in the suit. The trial was proceeded with, the guardian *ad litem* of the second defendant being absent, but the other parties being either present or represented. After some evidence was recorded, a decree was given in favour of the plaintiffs making the land inclusive of the second defendant's share liable. On the plaintiff's proceeding to execute this decree the second defendant's guardian *ad litem* applied under S. 108 of the Civil Procedure Code to have the decree set aside. The District Judge dismissed the application, being of opinion that the decree should be taken as one passed under S. 158 of the Civil Procedure Code. No doubt, if the case were one in which time had been specifically granted to the second defendant "to produce his evidence or to cause the attendance of his witnesses or to perform some other act necessary to the further progress of the suit" and he had failed to do what time had been granted to him for, the procedure might be said to have been under S. 158. But such was not the case. True, the application on behalf of the second defendant dated the 15th June prayed for an adjournment for three weeks to enable the applicant to take out summonses for her witnesses. But what took place on the 18th when her petition as well as that of the first defendant was disposed of, and the terms of the order itself, show that the adjournment was an adjournment of the suit with reference to all these parties and that the adjourned date was not fixed for the purpose of anything being specifically done on behalf of the second defendant, as apparently was taken to be the case in *Rangaswami* v. *Srirangam*,[1] *Comalammal* v. *Rangaswami*,[2] and *Ambalavana* v. *Subrahmania*.[3] The ground taken by the District Judge in dismissing the petition was clearly, therefore, unsustainable, and the action

1. (1869) 4 M.H.C.R. 254. 2. (1871) 4 M.H.C.R. 56.
3. (1868) 6 M.H.C.R. 262.

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of the Court must be taken to have been under S. 157 of the Code of Civil Procedure.

The learned Vakil for the plaintiffs, however, urged before us that, even in this view, it did not follow that the decree, in so far as the second defendant was concerned, was an *ex-parte* decree, and that the case should be deemed to be governed by the latter part of the section, and the decree taken to be one passed after an order of the description contemplated by the words " or make such other order as it thinks fit" in the section. It is not quite easy to follow this contention. The obvious meaning of the section in question is that, if on the day to which the hearing is adjourned, the parties or any of them fail to appear, it is discretionary with the Court to adopt one of two courses, *viz.*, either at once proceed to dispose of the case and bring it to a termination in one of the modes pointed out in Chapter VII or defer the disposal of the suit making any order pursuant thereto. If this is the correct view, as it seems to be, it follows that the latter part of S. 157 has absolutely no application to a case such as the present where the Court at once proceeded to trial and judgment.

The remaining question for determination is whether on the 26th, the second defendant did not " appear" notwithstanding that his vakil was present and applied for adjournment. The cases of *Soonderlal* v. *Goorprasad*[1] and *Latta Prasad* v. *Nand Kishore*,[2] which fully deal with the law bearing on the question under consideration, clearly establish that the mere fact of the pleader appearing for a party and applying for an adjournment does not preclude the conclusion that the party, nevertheless, did not appear within the meaning of S. 157 and Chapter VII of the Code of Civil Procedure. No doubt, in the present case, the Pleader who moved for the adjournment had not been retained solely for that purpose. But the course adopted by him after the adjournment was refused leaves no alternative but to hold that he thenceforward ceased to represent his client. Of course a Pleader may have no instructions, and yet he may not withdraw from the case; nor does the circumstance that he informs the Court that he has no instructions, necessarily imply an intimation that he does withdraw. In cases where a Pleader makes such a communication it would be well explicitly to ascertain whether the Pleader severs his connection

1. (1898) I. L. R. 23 B., 414. 2. (1899) I. L. R. 22 A. 66.

with the case. Though this was not done in the present instance, it is impossible to doubt that such was, in fact, the case when it is seen that after stating he had no instructions the Pleader altogether abstained from taking any part in the examination of witnesses, or in the argument of the case—more especially as he had been appearing for a party who was incapable of acting for himself and whose guardian *ad litem* was absent.

The decree passed against the second defendant in such circumstances, must be held to have been an *ex-parte* decree. The order of the District Judge must therefore be reversed. The second defendant's application must be restored to file and dealt with according to law. Costs will abide the result.

Russell J:—The guardian of the second defendant applied to the District Court under S. 108, C. P. C., to set aside a decree passed against him alleging that it was an *ex-parte* decree.

The District Judge dismissed the application, being of opinion that the suit had not been disposed of *ex-parte*, but under S. 158, C. P. C., this is the appeal from that order.

The facts are as follows:—

Up till the 28th June 1901 the suit proceeded in the ordinary manner in the presence of all the parties and their Pleaders. It appears that some attempts had been made to effect a razinama, but they fell through ; and on the 18th the Court, in the presence of all the parties, adjourned the suit to the 26th June 1901 for final disposal, the pleaders on both sides concurring in the order and undertaking to be ready on that date—*vide* counter-petition of the plaintiffs dated the 30th August 1902. In the face of this specific statement it is not now open to the plaintiffs' Vakil to argue that the adjournment till the 26th was granted for the convenience of the two defendants above, and thus that the case falls under S. 158, C. P. C., which "applies where any party had a case adjourned and on the day of adjournment he is not ready"—vide *Alwar Ayyangar* v. *Seshammal*.[1] I consider that the adjournment granted in this case was one given for the convenience of all the parties.

The question now arises whether the second defendant who is the present petitioner put in an appearance or not at the final hearing. Up till the 18th June the second defendant had only

1. (1887) I. L. R. 10 M. 270.

Ramanuja Reddiar v. Rangaswami Aiyangar.

Russell, J.

appeared—on the 15th June the 2nd defendant's guardian through his Vakil applied for a three weeks' adjournment. The case was then posted for the 26th June for final disposal. On the 18th June the same date was settled. On the 24th June the same Pleader petitioned for two months' adjournment. An order was passed on the 26th June, the date of final hearing, rejecting the petition. There is nothing to show that the guardian of the 2nd defendant was present in person on the 26th June. I take it she was not. When the adjournment was refused the Pleader stated that he had no instructions and ceased to take any further steps in the case. The Judge proceeded to dispose of the suit and granted a decree in favour of the plaintiffs. Am I to say that the Judge proceeded under the first part of S. 157, C. P. C.?

A number of cases have been referred to in the argument. The case which seems to be the most nearly in point is *Soonder Lal* v. *Goorprasad*.[1] In that case after a number of adjournments by consent the regular Pleader of one of the parties was unable to attend. Another Pleader appeared, accompanied by the agent of his clients, and applied for an adjournment for two months. The adjournment was refused and the Pleader withdrew from the case. It was held that from that moment the party ceased to be represented in the suit. I am of opinion that when the Pleader in the present case declared that he had no instructions and ceased to take any action in the case, the party was unrepresented and the Court proceeded to dispose of the suit *ex-parte*. I cannot accept the learned Pleader's argument that the Judge acted under the second part of S. 157, C. P. C., by ordering the hearing to proceed.

I would set aside the order of the District Court and remand the case for disposal according to law.

Costs will abide the result.

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1. (1898) I. L. R. 23 B. 414.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sankaran Nair.

Lakshminarasappa and another .. Petitioners (*Accused* 1 & 2.)

v.

Mekala Venkatappah .. Respondent (*Complainant.*)

Criminal Procedure Code, Ss 423, 435, 437, 439—District Magistrate's powers of recision—Misappreciation of evidence by Sub-magistrate and discharge—District Magistrate, functions of. Lakshminarasappa v. Venkatappah.

Where a Court competent to decide whether the accused is guilty or not holds that he is not guilty on a consideration of the evidence adduced by the prosecution, that finding should, if at all, be set aside only by a Court competent to set aside such a finding of fact, *i.e.*, by the High Court under S. 439 Cr. P. C. read with S. 423. The District Magistrate is not entitled to come to a conclusion on the evidence and hold that a *prima facie* case has been made out and order "further inquiry" by another Magistrate. The proper course for the District Magistrate to take is to refer the matter to the High Court. It may be different when he exercises his powers for reasons other than mere misappreciation of evidence.

The proper function of a District Magistrate is criticism. He ought to point out to the Subordinate Magistrate the reasons which may have led him to an incorrect conclusion, *i.e.*, reasons which have been held to justify the High Court in interfering with findings of fact, to enable the Magistrate to come to a right conclusion and not dictate to him the decision to be pronounced.

Petition under Ss. 435 and 439 of the Criminal Procedure Code praying the High Court to revise the Order of the District Magistrate of Cuddapah in Cr. R. P. No. 11 of 1907 setting aside the order of discharge passed by the Sub-Magistrate of Kadiri in C. C. No. 112 of 1907 and directing further inquiry into the case by the First Class Divisional Magistrate of Cuddapah.

Dr. S. Swaminathan for petitioners.

The Public Prosecutor (E. B. Powell) for the Crown.

R. V. Seshagiri Rau for respondent (complainant).

The Court passed the following

ORDER :—This is an application to reverse the order of the District Magistrate of Cuddapah setting aside an order of discharge passed by the 2nd Class Magistrate of Kadiri, and directing a further inquiry by the 1st Class Sub-Divisional Magistrate

* Cr. R. C. No. 349 of 1907. 18th December 1907.
Cr. R. P. No. 260 of 1907.

Lakshminarasappa v. Venkatappah.

of Cuddapah on the sole ground that the Sub-Magistrate has misappreciated the evidence and arrived at a wrong conclusion on the facts.

The complaint was one of theft of a document, punishable under S. 380, Indian Penal Code. The 2nd Class Magistrate examined 8 witnesses and filed 6 exhibits for the prosecution and 9 exhibits on behalf of the defence, and discharged the accused as, in his own words, "the very existence of a document of the kind said to have been lost is doubtful and the case bears distinct marks of having been trumped up, as the witnesses are all untrustworthy." The District Magistrate, on the other hand, has "no doubt that the document existed," and he also saw no reason to consider that the witnesses have been giving false evidence, and accordingly directed further inquiry by another magistrate.

The petitioner's Counsel refers to Criminal Revision Case No. 501 of 1900, where this Court reversed an order of the District Magistrate directing a further enquiry on the ground of misappreciation of evidence. He also relies upon *Joy Gopal Bannerjee* v. *The Emperor*,[1] *Queen Empress* v. *Erram Reddi*[2] and *Rash Behari Lal Mandal and others* v. *The Emperor*.[3] Under the Codes of 1871 and 1892 it has been held that this Court will not exercise its power of revision on the ground that the lower Court has not rightly appreciated the evidence, the reason being that it is for the Court called upon to determine whether the person charged is guilty or not, to consider and weigh the evidence, and any error as to the probative force and effect is not open to correction on revision, but only on appeal—5 M. H. C. R., App. X, and *In the matter of Aurokiam*."[4] The same view has been accepted under the Codes of 1882 and 1898 in the case of *Queen-Empress* v. *Lakshmi Nayakan*[5] and Criminal Revision Case No. 343 of 1900.—Weir, page 255. The practice, so far as I am aware, has been in accordance with this view. While it is quite clear to me that the High Court is entitled to deal with any case on facts, it has been held that only in cases of defective investigation or failure to consider important evidence, or consideration of evidence from a wrong point of view, or contravention of any provision of law and of conviction upon facts which will not support the same, will

1. (1906) 11 C. W. N. 173.
2. (1885) I. L. R. 8 M. 296.
3. (1907) 12 C. W. N. 117.
4. (1878) I. L. R. 2 M. 38.
5. (1896) I. L. R. 19 M. 238.

the revisional powers of the Court be exercised. It is clear, therefore, assuming that the District Magistrate is right in his estimation of the evidence, that this Court would not have interfered with the order of discharge on the grounds stated by him. If the 2nd Class Magistrate had proceeded to frame a charge against the accused, and tried and acquitted him, the High Court alone could have interfered with the order of acquittal or convicted him on appeal by the local Government.

The District Magistrate's powers in this respect are defined by Ss. 435 and 437 of the Code of Criminal Procedure. Under S. 435, he is entitled to call for the records to satisfy himself "as to the correctness" of any finding or order, and may order "further enquiry" under S. 437 into the case of any discharged person, or refer the case to the High Court under S. 438 for orders. Reading Sections 439 and 423 together, there is no doubt that the High Court can set aside a finding of fact and direct a retrial or further enquiry. It was decided by the High Court in *Queen-Empress* v. *Amir Khan*[1] that the "further enquiry referred to in S. 437, is not the same as fresh enquiry in S. 436, and does not include the power to direct a Subordinate Magistrate to reconsider the same evidence on the sole ground that he has misappreciated the evidence," and it was pointed out that "the High Court itself which has a power that the Magistrate does not possess, namely, to order a retrial, is not warranted in so doing merely because the Magistrate who has discharged an accused person, in a case he was competent to try and finally determine, arrived at a conclusion different from that at which the High Court would have arrived as to the credit due to the witnesses" and that "if in cases not falling under S. 436, a District Magistrate has improperly discharged an accused person, by reason of his having misapprehended the law or committed a material error in procedure, the District Magistrate should, under S. 438, report the case for opinion and orders of the High Court."

The majority of the Judges of the Calcutta High Court took a different view as to the effect of the words "fresh enquiry" and held that it was open to the District Magistrate for sufficient reasons, acting under S. 437, to direct a reconsideration of the

1. (1885) I. L. R. 8 M. 337.

Lakshminarasappa v. Venkatappah.

case on the same evidence, and further, *Wilson* J., expressing the opinion of the majority of the Judges, said: "In a case not triable only by the Court of Session if the Sessions Judge or the District Magistrate is satisfied that on the evidence taken, there is a clear case for charging and trying the accused and there is no reason for further magisterial examination I think it is ordinarily his duty to refer the case to this Court which can make a suitable order and not to direct a further enquiry by a Magistrate." This Court, in *Queen-Empress* v. *Balasinnatambi and others*[1] agreed with the decision of the Calcutta High Court but did not indicate in their judgment the nature of the order to be passed under S. 437 that would be appropriate to the grounds on which the revisional powers of the District Magistrate are to be exercised. It is clear from *Queen-Empress* v. *Amir Khan*[2] and *Hari Doss Sanyal* v. *Saritulla*[3], therefore, that the balance of authority is in favour of the view that the District Magistrate, when he has come to the conclusion, as in this case, that *prima facie* the prosecution evidence is reliable, ought to have referred the case to this Court for orders instead of setting it aside himself on the grounds formulated by him in his order. It may be different when he exercises his power for other reasons than mere misappreciation of evidence. I am inclined to take this view. My reasons are these. Where a Court competent to decide whether the accused is guilty or not holds that he is not guilty on a consideration of the evidence adduced by the prosecution, that finding should, if at all, be set aside only by a Court competent to set aside such finding of fact, that is, by the High Court under S. 439 of the Code of Criminal Procedure read with S. 423. The District Magistrate, it is clear, is not entitled to come to a final conclusion on the evidence and hold that a *prima facie* case has been made out because, in that case, the proper order would be one to direct a charge to be framed and try the accused on that charge. *Prinsep* J., no doubt, in the case of *Hari Doss Sanyal* v. *Saritulla*[3] was of opinion that he had such power, but I agree with *Wilson* J. who delivered the judgment of the majority of the Judges that that view is not correct for the reasons given by him at p. 620. In addition to these reasons, I would add that S. 436, which empowers the District Magistrate to direct a committal, which involve, the framing of charge, and for which,

1. (1890) I. L. R. 14 M. 334. 2. (1885) I. L. R. 8 M. 337.
3. (1888) I. L. R. 15 C., 622.

Lakshminarasappa v. Venkatappah.

a finding that a *prima facie* case has been made out, is a preliminary condition, supports the same view. The case *Queen Empress* v. *Munisami and others*[1] apparently accepts that principle. The proper function of the District Magistrate is, therefore, criticism. He ought to point out to the Subordinate Magistrate the reasons which may have led to an incorrect conclusion, reasons which have been held to justify the High Court in interfering with the findings of fact, to enable that Magistrate to come to a right conclusion, and not to dictate to him the decision to be pronounced. In a case of difference of opinion upon the evidence, he ought to refer the matter to the High Court which has also the powers of the appellate Court to deal with that reference. The procedure above indicated keeps in view the ordinary distinction between the revisional and appellate jurisdictions of a Court. A power to order what is practically a retrial, to give a complainant another opportunity of re-examining his witnesses and adducing fresh evidence ought not to be presumed as it is unjust to the accused and opens a wide door to perjury and corruption. That the case is only one of discharge which is not, ordinarily at any rate, a bar to fresh prosecution, supports the same view, as the injustice, if any, to the complainant may be thereby remedied. That it will be generally inquired into by the same Magistrate and good reasons will have to be adduced by the complainant for coming to a different conclusion, is a sufficient guarantee that this privilege is not likely to be abused.

Assuming that the Magistrate has the power, he ought to exercise it subject to the limitations placed by the High Court upon their own larger powers. It has been suggested that the High Court refuse to interfere for the reason that the evidence has already been considered by two Courts. I have already pointed out that this is not the ground of decision. This was not so in the case reported in Weir, page 257, nor in the cases in 5 M. H. C. Ap. X, and *In the matter of Aurokiam.*[2] The right of appeal given to the Local Government against a judgment of acquittal by an appellate Court does not support that argument.

But as the records have been called up and the District Magistrate considers the view of the 2nd Class Magistrate

1. (1891) I. L. R. 15 M. 39.
2. (1878) I. L. R. 2 M. 38.

Lakshminarasappa v. Venkatappah.

unsustainable, I have heard Counsel on the evidence to see whether this Court ought to interfere in revision.

The prosecution case is that an unregistered sale deed executed by the father of the 1st accused in favour of the complainant's uncle more than 35 years ago, was taken by him to the first accused for preparing an application for transfer of patta; that the latter gave it to a petition-writer, Subban Singh, to prepare the transfer application in one Somayya's house and, when, after preparing the application, the petition-writer went to the Sub-Registrar to show him this and a lease-deed which he had prepared, leaving the sale deed in Somayya's house, the 2nd accused took it and rushed into the house of the 1st accused with it. The prosecution 2nd and 4th witnesses are admittedly interested in the complainant. No independent witnesses of Kadiri are produced. No explanation is given for the necessity of this application after a lapse of 30 years. There is no explanation whatever, why it was necessary to take the documents to the Sub-Registrar. No motive on the part of the 2nd accused is alleged, much less proved. He is a Mahomedan, while the 1st accused is a Hindu. For these reasons, I see no reason to interfere with the order of discharge.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Munro and Mr. Justice Sankaran Nair.

Mahammade *alias* Hummade Beari .. Appellant.* (*Plaintiff.*)

v.

The Secretary of State for India in Council by the Collector of S. Canara .. Respondent (*Defendant.*)

Mahammade v. The Secretary of State.

Darkhast Rules (Madras)—Darkhast of land within Port limits—Grant without consulting Presidency Port Officer—Mere irregularity—Grant not set aside on appeal within time—Binding character of.

Per *Munro* J :—A Darkhast grant made by a Divisional Officer, without previously consulting the Presidency Port Officer, as required by Government Order Mis. No. 4017 is a perfectly good and valid grant, the same being within the scope of the Divisional Officer's authority.

The Divisional Officer is not bound to follow the opinion of the Presidency Port Officer according to the Government Order mentioned.

Per *Sankaran Nair* J :—A Darkhast grant by a competent authority is binding on the Crown unless it is cancelled on appeal within time.

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*S. A. No. 343 of 1905. 10th January 1908.

The notice to the Port Officer required by Government Order No. 4017 is only a formality, and the omission to give such notice before making a Darkhast grant of land within Port limits is a mere irregularity, the Revenue officer not being bound to follow the opinion of the Port Officer.

Mahammade v. Secretary of State.

Munro, J.

Second Appeal from the decree of the District Court of South Canara in A. S. No. 84 of 1904 presented against the decree of the Court of the District Munsif of Kasargod in O. S. No. 343 of 1902.

K. Narayana Rao for appellant.

The Government Pleader (*E. B. Powell*) for respondent.

The Court delivered the following

JUDGMENT:—*Munro* J:—In 1895, certain land within the limits of the port of Koombla was granted on darkhast to the plaintiff-appellant by the Divisional Officer, on appeal from the order of the Tahsildar refusing to grant it. Before making the grant the Divisional Officer did not refer the plaintiff's application to the Presidency Port Officer as required by Government Order, dated the 4th July 1890, Mis. No. 4017, Rev., embodied in the Board's Proceedings No. 434, dated the 21st July 1890—Exhibit *II.* On this ground the Collector, five years later, cancelled the grant and called upon the plaintiff to execute a muchilika in respect of the land, or vacate the same by a certain date, failing which penal assessment would be imposed. The plaintiff then sued for a declaration that the Collector's order was not binding upon him, and, having failed in both the Courts below, has filed this second appeal.

The Counsel for the Crown was unable to support the decree except on the ground that the grant by the Divisional Officer was bad inasmuch as the Presidency Port Officer was not first consulted. For the appellant it was contended that the failure to consult the Presidency Port Officer was a mere irregularity which did not justify the cancellation of the grant.

The grant by the Divisional Officer in appeal was binding upon the Crown and could not be revoked by the Collector if within the scope of the Divisional Officer's authority—*The Secretary of State for India in Council* v. *Kasturi Reddi.*[1] The only question then is whether, in the face of the Government Order above referred to, the Divisional Officer had authority to make the grant without consulting the Presidency Port Officer. In *Sappani*

1. (1903) I. L. R. 26 M. 268.

Mahammade v. Secretary of State.

Munro, J.

Asari v. *The Collector of Coimbatore*[1] the question arose whether a grant by a Tahsildar without consulting the Municipal Council, as by the rules he was required to do, was an act within the scope of his authority.

Bhashyam Iyengar J., for reasons which appear at pp. 753 and 754 of the report, held that the grant was within the scope of the Tahsildar's authority. With these remarks I entirely agree. *Mutatis mutandis* they exactly apply to the present case. Though, under the Government Order, the Divisional Officer was enjoined to consult the Presidency Port Officer before making a grant of land in port limits, the ultimate decision rested with him. The Government Order does not say that he was bound to follow the opinion of the Presidency Port Officer. I therefore think that the Divisional Officer, in making the grant, was acting within the scope of his authority, and that the grant binds the Crown. The lower Court's decree is therefore reversed, and the plaintiff will have a decree as prayed for with costs throughout.

Sankaran Nair J.—The land in dispute was granted on darkhast by the Tahsildar under the Darkhast Rules on the 20th February 1895 (Exhibit *K*). The Tahsildar had previously rejected the application of the plaintiff and directed the land to be sold by public auction, but that order had been reversed by the Divisional Officer on the 29th December 1894, who ordered that the land should be granted to the plaintiff (Exhibit *J*) and the Tahsildar accordingly assessed the land in the plaintiff's name and placed him in possession. The Munsif has also found that the plaintiff has effected improvements which are now valued at Rs. 1839-5-6.

On the 21st November 1901 the Collector ordered that the plaintiff should be asked to execute a lease for the land on certain conditions, or vacate the land, failing which a prohibitory assessment of one rupee a cent was to be levied from him (see Exhibit *O*).

No order, in terms cancelling the grant, has been produced, though it is admitted that the grant of February 1895 has been cancelled. None has been communicated to the plaintiff.

The plaintiff now sues for a declaration of his right under his grant, and contends that the order of the Collector is invalid.

1. (1903) I. L. R. 26 M. 742.

Mahammade v. Secretary of State.

Saukaran Nair, J.

The Munsif dismissed the suit on the ground that the land is within the port of Koombla, and therefore the grant is illegal and invalid under S. 67 of Act X of 1889. The Judge in appeal also held that the grant was *ultra vires* and was properly cancelled. It is quite clear that S. 67 of Act X of 1889 has nothing whatever to do with this case. It authorises "any local authority in whom any immoveable property in or near a port is vested" to alienate such property for certain purposes with the consent of the Local Government. It is not alleged that the property now in dispute is vested in any local authority. The learned Counsel for the respondent does not support the judgment on this ground. But he contends that the grant was made against the orders passed by the Board of Revenue that all applications for land in a port must be referred to the Presidency Port Officer before they are complied with, and that, therefore, the grant is irregular and unauthorized.

A grant purporting to have been made under the Darkhast Rules by an officer empowered by them to make it, is binding on the Crown unless it is revoked or annulled by an officer of a higher grade, on an appeal being preferred to him—see *The Secretary of State for India in Council* v *Kasturi Reddi*.[1] In the case before us no appeal was preferred within the time allowed, by the Port Officer or any person interested. On the other hand the plaintiff was placed in possession and allowed to continue in possession. It is not even now alleged that any objection has been raised by the Port Officer. It is pointed out in *Collector of Salem* v. *Rangappa*[2] that where the plaintiff has taken possession and is in possession under a pattah which can be issued only after the expiry of the time allowed for appeal and when the pattah was not issued conditionally by an officer not competent to act in the matter, the Collector is not entitled to dispute the plaintiff's title on the ground that the pattah was granted under a mistake by the Tahsildar without knowledge of all the facts. No fraud was alleged.

In *Periyaroyalu Reddi* v. *Royalu Reddi*[3] it was decided that a Civil Court is not entitled to cancel a pattah granted under the Darkast Rules on the ground that the formalities prescribed by

1. (1903) I. L. R. 26 M. 268. 2. (1889) I. L. R. 12 M. 406.
3. (1895) I. L. R. 18 M. 434.

Mahammade v. Secretary of State.

Sankaran Nair, J.

the Darkhast Rules have not been observed. It was pointed out in that case that "Darkhast rules are departmental, and if they are infringed the remedy for such infringement is also departmental" or, in other words, the appellate authority may set it aside within the time allowed. In this case the appellate officer has not cancelled the grant within the time allowed by law. It is unnecessary, therefore, to consider whether the Collector could have set aside the grant on account of the failure by the Tahsildar to give notice to the Port Officer, in the absence of any objection on the part of that officer. The notice to the Port Officer is only a formality, and the omission to give such notice cannot be more than an irregularity as the Revenue officers are not bound to follow the opinion of the Port Officer and are entitled to make the grant even in opposition to it.

If the grant in favour of the plaintiff is taken to have been made by the Tahsildar on the 20th February 1895 (Exhibit *K*) then as he was a competent officer to make the grant and his order has not been cancelled by the appellate authority within the time allowed, the plaintiff has acquired a valid title to the property. If, on the other hand, the grant must be deemed to have been made by the Divisional Officer by his order (Exhibit *J*) passed on appeal on the 29th December 1894 from a previous order of the Tahsildar refusing the plaintiff's application, the same result follows, as there was no appeal from the order passed by the Divisional Officer within the prescribed time.

The lower Courts' decrees are, therefore, reversed, and a decree will be passed in favour of the plaintiff with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Miller.

Sankappa Rai .. Appellant*
(6*th Accused*).

Sankappa Rai *In re.*

Cr. P. C., Ss. 297, 298—Misdirection to the Jury—Evidence Act, Ss. 27, 30—Statement of co-accused leading to the discovery of relevant fact, when evidence—Statement of a witness before investigating Magistrate—No evidence.

The question whether a person was in police custody while making a confession is one for the Judge to decide; and the omission of the Judge to state to the Jury his finding on the point that a person was in police custody is not a misdirection.

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* Cr. A. No. 780 of 1907. 5th February 1908.
Cr. P. C. No. 481 of 1907.

Under Ss. 27 and 30 of the Evidence Act, the most that could be taken into consideration in the statement of an accused against another would be so much of the information amounting to a confession as was the immediate cause of the discovery of some relevant fact against the person making the statement.

A statement made by a witness to a Police Inspector or to an investigating Magistrate is no evidence against an accused, even though the statement before the investigating Magistrate is made in the presence of the accused; and a direction to the Jury that such evidence is strong evidence against the accused is a serious misdirection.

Appeal from the sentence of the Court of the Sessions Judge of the South Canara Division in Cases Nos. 40 and 41 of the Calender for 1907.

K. Narayana Rao for appellant.

The Public Prosecutor (E. B. Powell) for the Crown.

The Court delivered the following.

JUDGMENT:—The 6th accused is the appellant before us; he was charged with abetting a dacoity and receiving stolen property and has been found guilty of the former offence and acquitted of the latter, the verdict of the jury being that "it is doubtful whether he received the stolen property knowing it to be stolen."

The principal contentions in the appeal are that the Sessions Judge has misdirected the jury (1) in regard to a confession said to have been made by the 1st accused, and (2) in regard to the statement made by the 2nd accused's wife Akku, prosecution witness No. 11.

The confession of the 1st accused was made to the Police Inspector and was therefore inadmissible in evidence, but under S. 27 of the Evidence Act, if the 1st accused was in the custody of the Police, so much of the information given by him might be proved as related distinctly to the discovery of the stolen property. The confession was to the following effect:—The 1st accused had obtained a share of the property stolen in the present dacoity and in the other three and he would produce it. * * * He had one mura of rice, and one kalsige of horse-gram, one umbrella, one piece of white cloth, and one rupee; on the night of the dacoities the stolen rice muras were carried to the Potel's (6th accused's) house, and there Potel gave three muras, one to him, one to Patta (2nd accused) and one to Malinga. He had left the umbrella in the Potel's house. The Sessions Judge directed the jury in the following terms:—" The law regarding confessions is that a confessional

Sankappa Rai *In re.*

statement made by an accused to a Police officer is not admissible against him, and it is perfectly just and reasonable, because you can hardly believe that a person will voluntarily confess his guilt to a Police officer, and if you take such a confession to be evidence against him, no doubt anybody may be convicted on such evidence. But the law says, supposing that, in consequence of such information, property is discovered, then so much of the information is relevant and can be proved against that person. If a person merely says 'yes, I stole the property' and if he afterwards says he did not say so, you may have reason to believe that his confession was not voluntary and true. But if it is said that he confessed and produced the property as being his share, then you have good reason to believe that the confession is a truthful thing unless the production of the property can be otherwise accounted for, and therefore the law wisely says that 'unless such corroboration is afforded a confession to the Police is not relevant.' But if you find corroboration, and property is discovered in consequence of such statement, then to that extent it is a relevant matter, and therefore, in my opinion, the statement of the 1st accused that he had certain stolen property, that the Potel gave one mura to him and one each to the 2nd accused and to Malinga, and that the rest of the muras were with the Potel is relevant as against the 1st accused himself and, as S. 30 of the Evidence Act says, such confession may be taken into consideration against such other person, that is, against 2nd and 6th accused."

It is first objected to this direction that the 1st accused was not, at the time he gave the information, in the custody of the Police. The Police Inspector's evidence, however, implies that he was brought to him by a constable to Venkatakrishna Bhatta's house, and the Sessions Judge, though he does not say so, might well have accepted this evidence as proving the custody. It was the duty of the Judge, not of the Jury, to decide the point as being a matter of fact which it was necessary to prove in order to enable the confession to be admitted in evidence [Criminal P. C., S 298, Cl. (*d*)] and his omission to state to the Jury his finding on the point is not a misdirection and could not prejudice the accused. We think the Sessions Judge was wrong in leaving to the Jury to take into consideration the 1st accused's confession as against the 6th accused, the statement by the 1st accused that he had certain stolen property with him, and that the 6th accused gave

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him one mura of rice and gave one mura of rice to the 2nd accused and one to Malinga. The facts were not the immediate cause of the discovery of stolen property in the Potel's house (vide *Queen-Empress* v. *Commer Sahib*[1]) and it cannot be that a statement which would not have been admissible against the 6th accused, if made by himself when in custody, is admissible against him when made by a co-accused when in custody. The most that could be taken into consideration as affecting the 6th accused would be so much of the information, if it amounted to a confession, as was the immediate cause of the discovery of some fact relevant against him—in the present case the fact that he was in possession of stolen rice—and as that, in this case, was only the statement that the 1st accused carried some rice to him which could not amount to a confession, there is here no confession which could be taken into consideration against the 6th accused.

In paragraph 9 of his charge to the Jury the Sessions Judge deals with the evidence of the witness Akku, and after pointing out that she at the trial (and we may remark also in the committing Magistrate's court) withdrew the statement which the Inspector alleged that she had made to him, directed the Jury that if they believed the story which the witness told the Inspector and which was also recorded in a statement made to an investigating Magistrate, though not to the committing Magistrate "it is a strong ase against the 6th accused as also against some other accused." early there is here a serious misdirection.

The Sessions Judge has told the Jury that they may use as dence against the accused a statement made behind their k, and not tested by cross-examination. Whether the judge is erring to the statement made to the Inspector or to the statement (Exhibit *G*) made to the Magistrate Saldanha, the result is the same. Neither statement is evidence against the accused; for even if the latter statement was made in the presence of the accused, which does not appear, S. 288 of the Criminal Procedure Code will not apply to it as it was not made before the committing Magistrate holding an enquiry under Ch. XVIII of the Code.

The Sessions Judge has thus directed the Jury that a statement which is not evidence against the 6th accused (though it might, no doubt, be used to contradict the witness) is, if believed,

1. (1889) I. L. R. 12 M. 315.

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strong evidence against him. It is clear the verdict cannot in these circumstances be sustained. The misdirection is repeated in paragraphs 14 and 15 of the charge and must have misled the Jury.

Throughout his charge the Sessions Judge has placed too much stress upon statements made or alleged to have been made to the Inspector of Police and too little on the evidence given by the witnesses at the trial. The statements made to the Police cannot be treated as evidence on which the accused can be convicted when the facts stated in them are not proved by evidence given at the trial. The evidence of the prosecution witness No. 20 seems to be altogether irrelevant, and we think that the Jury should not have been told that they were entitled to draw any inference against the 6th accused from that evidence or from the fact that there were 3 or 4 dacoities on the same night in the same neighbourhood. We set aside the conviction of the 6th accused and direct his re-trial.

The prisoners Nos. 1 to 5 convicted of dacoity have not appealed, and inasmuch as there is clearly evidence against them, sufficient to warrant their conviction, and the misdirection on which we have to set aside the conviction of the 6th accused affects only some of them and affects those to a much slighter extent than it affects the 6th accused, and further, considering the fact that the sentence passed on them is a light sentence for the offence of dacoity and a sentence which might be increased on a re-trial, w think that we are not called on to interfere on their behalf revision.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:—Mr. Justice Wallis and Mr. Justice Sankaran Nai

Vedammal .. Appellant* (*Defendant.*)

v.

Vedanayaga Mudaliar .. Respondent (*Plaintiff.*)

Vedammal v. Vedanayaga Mudaliar.

Hindu Law—Inheritance—Disqualification—Heirs—Complicity in murder of deceased man—Quantum of proof—Onus—Acquittal in Criminal Court, how far proof of innocence—Unchastity of mother no test—Raghunandana, no binding authority in Southern India.

A person who is guilty of the murder of another cannot succeed to the estate of the murdered man.

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* A. No. 228 of 1905. 12th December 1907.

The acquittal of the person claiming to be the heir of the last owner on a charge of having abetted his murder by a Criminal Court is no answer to a civil suit by the next heir claiming to succeed in preference to the defendant (the acquitted person) on the ground that the defendant had disqualified herself from inheriting to the deceased's estate by reason of her complicity in the crime. But the defendant's complicity should be proved by clear and satisfactory evidence in order that she may be excluded.

Unchastity is not a ground for excluding any female heir except a widow from inheritance.

A mother's claim to inherit the property of her deceased son rests on consanguinity and not on religious merit.

Neither degradation nor aggravated unchastity (*i.e.*, intercourse by a Hindu woman with a Mahomedan) affects the proprietary rights of the degraded or unchaste person.

Raghunandana is not an authority in the Madras Presidency.

Appeal from the revised decree of the Court of the Subordinate Judge of Tinnevelly in O. S. No. 28 of 1904.

The facts appear from the judgment of Mr. Justice *Sankaran Nair*.

T. Richmond and *T. V. Vaidyanatha Aiyar* for appellant.

V. Krisnaswami Aiyar and *A. K. Sundara Aiyar* for respondent.

The Court delivered the following

JUDGMENT:—*Wallis* J.—It has been decided by this Court that, if the defendant was a party to the murder of her son, she must be excluded from the inheritance and that the plaintiff, as next reversioner, is entitled to succeed. It is also clear that the fact that the defendant has been acquitted of the charge of murder is no answer to the present suit. But in order to entitle the plaintiff to succeed, it is, of course, necessary that he should establish the complicity of the defendant by clear and satisfactory evidence, and it is not enough to raise a case of suspicion against her. In the present case there can be no doubt that the connection formed by the defendant with the Mahomedan, Sheik Abdul Khader, who has been convicted of the murder of her minor son, was the original cause of trouble; and it may be that the attitude of the minor in regard to his mother's conduct was such as to give her as well as the Mahomedan a motive for desiring to get rid of him. But in order to enable the plaintiff to succeed, it is necessary that he should connect her by satisfactory evidence with the murder, and this, I think, he has failed to do. When the evidence is scrutinised, proof of her complicity is found to rest

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almost exclusively on the evidence of the approver Bala Naiken, the plaintiff's 7th witness. According to him, on the day of the murder, she went with the murderers from Vikramasingapuram to Ambasamudram, and at the latter place she first instigated the others to commit the murder and then expressed her approval after it had been committed. The evidence of instigation was given by the approver for the first time in this case more than five years after the event and after the approver had omitted to mention it in any of the statements taken from him during the criminal proceedings against the defendant; and, as pointed out by the Sessions Judge in his judgment which has been filed as Exhibit *R R* by the plaintiff, the approver's statement as to the defendant having expressed her approval of the murder after it had been committed did not appear in his earliest statement. There is, therefore, strong reason to suspect that he has lent himself to concocting a case against the defendant, and his evidence connecting the defendant with the crime requires to be clearly corroborated, not only because of his being an approver but also because of the tendency he has shown to add to his evidence against the defendant at successive stages of the case. On examining the evidence, I fail to find any satisfactory corroboration of his statements. The plaintiff's 10th witness, an old man of 73, now comes forward for the first time, five years after the event, and says that he saw the Mahomedan and others arrive in a cart at Ambasamudram on the day of the murder and afterwards went to the Mahomedan's house to ask for payment of a debt of Rupees fifteen and saw the defendant there. I think it would be unsafe to give any credence to evidence of this character. The plaintiff's witness No. 15 corroborates the plaintiff's witness No. 7 by speaking to having met the cart containing the four murderers on the road from Vikramasingapuram, where the defendant lives, to Ambasamudram where the Mahomedan's house was, but does not speak to the defendant's presence in the cart, and his evidence is quite consistent with the defendant's innocence. The new evidence of the plaintiff's witnesses Nos. 13 and 14 that, after the trial in the Sessions Court, as the Mahomedan was being led away, the defendant, in the presence of about 100 people, addressed him in a language which amounted to an admission of guilt is, in my opinion, improbable and unreliable. Besides, the plaintiff's witness No. 13 certainly speaks as if the acquittal of the

defendant and the sentence on the Mohomedan took place at the same time and were immediately followed by this incident, whereas the Mahomedan was not sentenced until some days after the defendant had been acquitted and discharged. With regard to the evidence as to the defendant's behaviour subsequently to the murder, it must be borne in mind that her conduct had been such as to set people against her and lead them to put the worst construction on her actions, and that further, supposing her innocent, her position was a very difficult one when it came out that her paramour had murdered her son and then absconded. She must naturally have been suspected and shunned by every one, and have found it very difficult to know what to do. Under these circumstances, I think, it would be very unsafe to draw inferences against her from her unwillingness to obey the Tahsildar's summons, or the other conduct spoken to by the witnesses for the plaintiff. The judgment of the Subordinate Judge, in my opinion, proceeds too much on grounds of mere suspicion and accepts, and acts on, the evidence of the approver, plaintiff's witness No. 7, which, in my opinion, is not sufficiently corroborated. I am, therefore, unable to agree with his finding on the second issue as to the defendant's complicity in the murder.

It is, however, further argued for the respondent that the defendant is debarred from succeeding to her son by reason of her unchastity which, we agree with the lower Court, has been established by the evidence in the case. The Subordinate Judge overruled this contention on the authority of *Kojiyadu* v. *Lakshmi*[1] which is directly in point; but in this Court it has been argued that the learned Judges who decided the case in *Kojiyadu* v. *Lakshmi*[1] erred in following *Advyapa* v. *Rudrava*,[2] as that case merely lays down the law applicable in Western India, and a different rule prevails in Southern India. Although the Mitakshara says nothing expressly about women other than widows being debarred from succession by unchastity, it is contended that it must be read with the Smriti Chandrika which is applicable to Southern India, and that, according to this authority, unchastity is a bar. I am unable to accept this contention. It is true that in Ch. XI, S. 2, *pl.* 26, p. 190, of Krishnasami's translation, the Smriti incorporates the text of Brihaspati as to

1. (1882) I. L. R. 5 M. 149. 2. (1880) I. L. R. 4 B. 104.

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the qualifications of a daughter to succeed, one of which is that she is to be "virtuous and devoted to obedience," but in Ch. V. *pl.* 15, the same authority adopts a text of Brihaspati excluding sons destitute of virtue from inheritance. It cannot now be argued that a son could be excluded on the ground that he was destitute of virtue, and I fail to see why a different rule should be applied to daughters. The unchastity of the widow is expressly laid down as a ground of exclusion in numerous texts, but there is no such clear authority in favour of excluding other females, and in the absence of clear authority such exclusion ought not, in my opinion, to be enforced. For these reasons and for the reasons given by the learned brother whose judgment I have had the advantage of reading, I see no grounds for refusing to follow the decision in *Kojiyadu* v. *Lakshmi*.[1] It was further argued that illicit intercourse with a person not belonging to an equal or superior caste *ipso fcto* produces degradation without any formal exclusion from caste, but, even if this be so, degradation does not affect merely proprietary rights of the degraded person since the passing of Act XXI of 1850 (*Subbaraya Pillai* v. *Ramasami Pillai*,[2]) and there is no authority for the contention that aggravated unchastity has that effect. In the result, I think, the appeal must be allowed and the plaintiff's suit dismissed with costs throughout.

Sankaran Nair J.—This is an appeal from the decision of the Subordinate Judge, declaring that the plaintiff is entitled, as the nearest reversioner, to the properties of Sankaramurthi Mudali in preference to his mother, the defendant, who, it is contended, has forfeited her rights on account of her having been a party to the murder of her son Sankaramurthi "and owing also to her unchastity and loss of caste."

It has been already decided by the High Court that the defendant would not be entitled to any beneficial interest in the inheritance, if she is proved to have been a party to the murder as alleged by the plaintiff. That question, therefore, is not open to us for consideration. We have only to see whether the facts proved justify the conclusion of the lower Court.

Sankaramurthi Mudali's father died in 1887 leaving a valuable estate to his only son, who was then only two years old. The latter lived with his mother, the defendant, till 1897 when she

1. (1882) I. L. R. 5 M. 149.

2. (1900) I. L. R. 23 M. 171.

appointed a Mahomedan, Sheik Abdul Kadir Saheb, as an agent under a general power of attorney. This agent lived with the defendant in her house. Sankaramurthi objected to it, and went to live with his mother's sister's son Sankaralinga Mudali at Tiruppudaimaruthur, while the defendant, his mother, continued to live with her Mahomedan agent in his house at Vikramasingapuram.

Sankaralinga, early in 1897, applied to the District Court for the removal of the defendant from the guardianship of her son, the deceased, and the appointment of another guardian (Exhibit *S*). The Court appointed the defendant's brother as guardian (Exhibit *U*). The High Court on appeal by the defendant ordered that the defendant should be joint guardian with her brother (Exhibit *BB*). Subsequently, the brother refused to act as a guardian, and the defendant then prayed for the appointment of another joint guardian. The District Judge, finding that there was no proper person to be appointed as guardian, ordered the appointment of a Receiver to the estate. The High Court on appeal held (Exhibit *NN*) that the District Judge had exceeded his powers and called for a finding. Among the witnesses examined by the Judge was the deceased who deposed that he had to leave his house as the Mahomedan agent was living with his mother in that house (Exhibit *P*). This was on the 14th July 1900. On the 18th July, the District Judge submitted his finding to the High Court in which he recommended that the defendant might be appointed sole guardian.

On the night of the 25th August, the deceased left the house of Sankaralinga Mudali and disappeared. On the morning of the 27th, his body was found lying partly in the water in the river at Athalanallur just south of the village in which he was living. It was buried by order of the Village Magistrate. But on Sankaralingam's complaint setting out his suspicions against the defendant and her agent, Sheik Abdul Khadur, the body was exhumed on the 2nd September in the presence of the Magistrate, the Station House Officer, and the Medical Officer. The *post mortem* showed that the deceased met his death by strangulation. Sheik Abdul Khadar, his brother Kuppai Rowther, one Manikam, and the defendant were tried, the first three for murder and the last for abetment thereof. The defendant was acquitted and the others convicted and sentenced to transportation for life.

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It is also in evidence that there was a proposal, shortly before his alleged murder, to marry the deceased to a girl of an influential family in the locality.

It is now the plaintiff's case that, on account of the bitter feelings she entertained towards her son for his hostility to herself and her paramour, which led to the various proceedings above referred to and which were intensified by the statement (Exhibit *P*) in which he openly denounced her for living in open immorality with a Mahomedan, in a Court of Justice, and alarmed at the consequences to herself of his approaching marriage, which would bring him powerful relatives and deprive her of any chances of succession in case of his death, the defendant conspired with Sheik Abdul Khader and others to compass his murder. The main evidence against the defendant is that of the plaintiff's witness No. 7, a cart driver in her employ, who states that after the deceased made the statement, (Exhibit *P*) already referred to, before the District Judge on the 14th July, there was an altercation between the defendant and her son when she was returning to her village, when she snatched a knife which the witness had in his waist and rushed at her son addressing some threatening words to him. She was prevented from doing anything by himself and other by-standers. On the day of the murder the defendant, Sheik Abdul Khader and his brother left Vikramasingapuram in his cart at about 12 noon and reached Sheik Abdul Khader's house at Ambasamudram in the evening, one Manikam joining them on the way. While they four, shortly after, left the house for the scene of murder, the defendant, according to this witness, told them "You are going to call my son. If he in compliance with your request comes, it is all right. Otherwise you will do as much as you know to do and come." The witness further states "she also added that we need not return if we omit to do as much work as we know to do." He gives the details of the murder of the deceased by Sheik Abdul Kader and his brother, assisted by himself and Manikam, and deposes that on their return Sheik Abdul Kader told the defendant that they had completed their work, when she replied "Right. The weed has been got rid of." These four absconded the same night, while the defendant stayed behind. This evidence of the accomplice received material corroboration so far as his three associates in the murder were concerned and they were accordingly convicted by the Sessions Judge.

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As against the defendant, the altercation on the 14th is spoken to by the plaintiff's 8th witness. The evidence as to the defendant leaving for Ambasamudram on the day of the murder is supported by that of the plaintiff's 10th witness. These are new witnesses not examined at the trial before the Sessions Judge. The instigation by her before this witness and others left Ambasamudram to commit the murder was not mentioned by this witness before, to the investigating officers, to the Committing Magistrate, or the Sessions Judge when the facts must have been fresh in his memory, and is more important to prove the defendant's complicity in the crime than any other incident spoken to by him. He states it now for the first time five years after. This evidence as to instigation is clearly false. It was argued before us, that the relatives of the defendant who assisted the prosecution in the Sessions case kept back, or at any rate did not put forward, all the evidence available against the defendant as they did not want to get her convicted and that this accounts for the omission of the evidence at the previous enquiry and trial. The state of feeling that existed between the parties does not support this view. What actually happened rebuts any such presumption. In the petition presented on the 1st September, Sankaralinga Mudally denounced the defendant as a party to the crime. On the 4th, a witness, Pasunkili Tevan, was produced before the Magistrate, who professed to have been present when the murder was talked of by the defendant and others. His deposition was filed before the Sessions Judge, but he was not examined either before the Committing Magistrate or the Sessions Judge and was evidently dropped as a false witness. It also appears from the judgment of the Sessions Judge that a false witness, not now examined, was examined to prove that he was asked by the defendant and Sheik Abdul Khader to put poison in the food of the deceased. The suggestion that all the available evidence was not put forward cannot be accepted and the evidence of the 8th and 10th witnesses must also be rejected on the same ground.

As to the remark the defendant is alleged to have made on their return after the commission of the murder, the Sessions Judge has pointed out that this did not appear in the statement made to the Superintendent of Police. I have already found that he is not a reliable witness. This brief statement by her is

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utterly inconsistent with what she is alleged to have spoken to them on their departure when she exhorted them to bring her son to her, if possible, and suggested recourse to any other step only on failure of that attempt.

The defendant's departure for Ambasamudram from her village in the company of the murderers on the day of the murder appears to be so unnecessary and reckless, and calculated to draw such strong suspicion on herself, that it is incredible she should have gone there on that day if she had any knowledge of the contemplated murder. Without such knowledge, her presence at Ambasamudram is not material, as it appears from the evidence of the Station House Officer that he had seen her there before. Exhibits *J* and *K* only show (see the evidence of the plaintiff's 8th witness) that she was anxious to get back her son. I disbelieve the evidence of the 13th and 14th witnesses as it is not likely that after her discharge on the 8th she would again attend the Sessions Court or that she would make the remarks attributed to her in the presence of a crowd.

As to the probabilities of the case, there is no doubt the death of the minor would have benefited her, but, on the other hand, he was her son and she was always sure of maintenance at least out of the estate. Sheik Abdul Khader had a stronger motive. He would have been turned out on the minor coming of age.

It is possible that the defendant may have been a party to the conspiracy to murder her son. But the evidence is quite consistent with the view that the murder may have been carried out by Sheik Abdul Khader and his three accomplices for his own benefit without the knowledge of the defendant. The evidence of the accomplice does not receive reliable corroboration as to her complicity, and alone, it is suspicious, and therefore insufficient to support a finding in favour of the plaintiff. There is no doubt that when the four assassins disappeared the same night and she was informed of the death of her son, she must have known then that they were responsible for his death. And her subsequent conduct is that of a terrified woman apprehensive of serious consequences to herself.

For these reasons, I am unable to hold that the defendant has been proved to have been a party to the murder of her son.

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It is then argued that as the defendant has been proved to have been unchaste before the death of her son, she is not entitled to succeed to him under the Hindu Law. This question has been decided by this High Court in favour of the appellant, defendant, in *Kojiyadu* v. *Lakshmi*[1] which has been approved in *Angammal* v. *Venkata Reddy*.[2] This Court followed a decision of the Bombay High Court *Advyapa* v. *Rudrava*.[3] In Allahabad though the point did not arise directly for decision, the only opinion that has been expressed on the point is in favour of that view—*Musammat Ganga Jati* v. *Ghasita*.[4] In Calcutta a different view has been taken in *Ramnath Tolapattro* v. *Durga Sundari Debi*[5]; *Ramananda* v. *Raikishori Barmani*[6]; *Sundari Letani* v. *Pitambari Letani*.[7] These cases refer to the daughter's claim. But that does not make any material difference. The learned Judges refused to follow the Madras and Bombay decisions as "they are all under Schools of Hindu Law other than the Bengal School and were decided with reference to authorities different from those that are specially followed in the district with which we have now to deal"—*Ramananda* v. *Raikishori Barmani*.[6] These decisions therefore form no ground for a review of the decision of this Court. In my opinion, we are therefore concluded by authority.

But as the question has been argued at great length before us, I proceed to give my opinion. After giving full weight to the arguments advanced, I see no reason to differ from the conclusions arrived at by the learned Judges of this Court, that unchastity is not a ground for excluding any female heir except a widow from succession. Mr. Mayne is of opinion that the causes entailing civil disability are reduced to those originally stated by Manu, with the addition of lunacy and idiocy and any incurable disease which is now limited to the worst form of leprosy—§ 592. Neither Manu nor Yajnavalkya refers to 'unchastity' as a disability. 'Vice' is stated to be a ground of exclusion of heirs by Narada and this is made applicable by Vignaneswara to females also in *Placitum* 8, Section X, Chapter II of the Mitakshara. But the High Courts in India have refused to treat it as such, and it

1. (1882) I. L. R. 5 M. 149.
2. (1902) I. L. R. 26 M. 509.
3. (1879) I. L. R. 4 Bom. 104.
4. (1875) I. L. R. 1 A. 46.
5. (1878) I. L. R. 4 C. 550.
6. (1894) I. L. R. 22 C. 347.
7. (1905) I. L. R. 32 C. 871.

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is only relied upon before us to support the probability of unchastity being regarded as a legal disqualification by the Hindu Law-givers.

'Unchastity' is not mentioned as a bar to succession in the Mitakshara, and the full discussion of several grounds of exclusion including some which are not now recognized as such in Chapter X, Section II, without any reference to unchastity, and the express reference to it as a preliminary condition to succession in the case of a widow in *Pl.* 6 and *Pl.* 18, Section I, Chapter II, strongly supports the view that in the case of other heirs, like the daughter and the mother, no such disqualification exists.

That unchastity by itself is not a disqualifying cause has been decided also by the Calcutta High Court in *Nogendra-Nandini Dassi* v. *Benoy Krishna Deb*[1] in which it was held that a woman is not thereby disqualified from inheriting *Stridhan*, as in that case inheritance depends on consanguinity.

The rule of exclusion is deduced from the theory of Hindu Law that the heir takes the inheritance for the performance of the ceremonies essential to the spiritual welfare of the deceased and his incapacity therefore to perform his obligations excludes him from succession. Now what are the grounds on which the mother's right of inheritance is based ?

In the Digest the following old texts are cited :

"A mother surpasses a thousand fathers, for she bears and nourishes the child in her womb: therefore is a mother most venerable."

Vyasa—"Ten months a mother bore her infant in her womb, suffering extreme anguish; fainting with travail and other pangs, she brought forth her child." "Loving her sons more than her life, the tender mother is justly revered: who could recite all her merits, even though he spoke a hundred years?"

Other texts are also cited showing the superiority of one parent to the other.

Coming now to the commentaries, the author of the Mitakshara, after declaring the right of the parents to succeed to the property of a deceased son in the absence of nearer heirs, in

1. (1902) I. L. R. 30 C. 521.

Sloka (1) which runs thus—"on failure of those heirs, the two parents, (meaning the mother and the father) are successors to the property"—proceeds to discuss the question of preference of the mother over the father. He draws an inference in favour of the mother from the compound term *Mátapitarau* which has been reduced to '*Pitarau*,' and then proceeds thus:

Chapter II, S. 3:—(3) "Besides, the father is a common parent to other sons, but the mother is not so : and since her propinquity is consequently greatest, it is fit that she should take the estate in the first instance conformably with the text : "To the nearest *Sapinda* the inheritance next belongs."

(5) "Therefore since the mother is the nearest of the two parents, it is most fit that she should take the estate. But on failure of her, the father is successor to the property."

The author defines *Sapindaship* to arise "between two people through their being connected by particles of the one body," without any reference to the capacity to offer religious oblations. Thus the mother's right of succession is not made to depend upon her capacity to perform any ceremonies, or on the ground she may have a son to offer oblations as a condition precedent to succession. There is no reference to her chastity. It is based on the ground of her having borne and nourished the son in the womb. The author of the Mitakshara bases her right to take her place before the father upon her nearer relationship to the deceased. The Smriti Chandrika also has no reference to the capacity of the mother to confer spiritual benefits on the son.

This view of Vignaneswara that the mother's claim to inherit is based on consanguinity is in harmony with his doctrine which prefers family relationship to efficacy of religious offerings as pointed out by Mr. Mayne § 512 p. 692 and 510, 511, 512, 513, and § 521 at p. 708 and also in various decisions of this Court.

Jimutavahana, no doubt, introduces the religious element. Dayabhaga, Chap XI, Section IV, Sl. 2, contains the following reasons for her succession :

" It is necessary to make a grateful return to her for benefits which she has personally conferred by bearing the child in her womb and nurturing him during his infancy, and also because she confers benefits on him by the birth of other sons who may

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offer funeral oblations in which he will participate." The additional ground here given would not apply to the widowed mother of an only son, who is, nevertheless, acknowledged to be an heir, or, as Mr. Mayne observes, "to the mother of an only son or of a son whose brothers had died before him without leaving issue." The birth of other sons is clearly not indispensable for a recognition of the right, and religious efficacy is not the main cause even according to the Dayabhaga. In fact Jimutavahana was only trying to justify by spiritual consideration in accordance with his principle that the test of heirship is religious merit, a right of succession already well established. This will also appear from the principle of succession with reference to daughters laid down in the Dayabagha.

If we now compare the case of the daughter with that of the mother, it will be found, as in the case of the mother, that while the Mitakshara, Chap. II, Section 2, § 2, bases such right on the simple ground of consanguinity, the Bengal lawyers put it on the ground that she produced sons who could present oblations, and Jimutavahana accordingly, unlike Vignaneswara, lays down that no daughter could inherit unless she had, or was capable of having, male isssue, with the result that daughters who are widows or barren or who appeared to have an incapacity for bringing any but daughers into the world were excluded—Dayabhaga Ch. XI, Sec. 2, § 1. The failure of Jimutavahana to push to its natural and logical conclusion his theory in the case of the mother by similarly excluding widowed mothers and those who only had the capacity for bringing daughters into this world, is remarkable, and shows that in his opinion it is only, as pointed out already, an additional argument advanced in support of the mother's claim. The Smriti Chandrika follows this doctrine of religious efficacy in this respect and similarly excludes barren daughters, and insists upon the daughter being "virtuous and devoted to obedience." This is only a moral precept. Further, this Court has, after a full consideration, rejected the authority of the Smriti Chandrika with reference to the principles on which the daughter's right of succession is based, and has held, subsequent to the decision in *Advyapa* v. *Rudrava*,[1] that consanguinity alone is the cause of her succes sion—*Simmani Ammal* v. *Muttammal*.[2] This comparison with

1. (1879) I. L. R., 4 B 104. 2. (1880) I. L. R. 3 M. 265 at p. 269.

the daughter's right of succession shows very strongly that the mother's claim rests on consanguinity and not on religious merit, and incapacity to inherit, due to inability to perform sacrifices cannot therefore be presumed.

This view receives confirmation fron the texts relating to the widow's right of succession.

The texts which are relied upon to exclude the unchaste widow are the following :—

Mitakshara, Ch II. S. I, Pl. 18 and 6.

Dayabhaga, Ch. XI, S. 7.

Vridha Manu—" The widow of a childless man, keeping unsullied her husband's bed, and persevering in religious observances, shall present his funeral oblation and obtain his entire share."

Katyayana—" Let the childless widow, keeping unsullied the bed of her lord and abiding with her venerable protector, enjoy with moderation the property until her death."

It will be observed that chastity is made a preliminary condition in the case of the widow while it is not referred to in the texts relating to the mother. Further, it seems to be also clear that they are not intended to apply to the mother succeeding to her son. Accepting the view that prevailed in Bengal that an unchaste mother or daughter is excluded, their Lordships of the Judicial Committee of the Privy Council say : " It seems clear that such exclusion is not by virtue of either of the abovementioned texts of Vridha Manu or that of Katyayana. These texts have reference to the deceased owner of the estate. The words 'his funeral oblation' and 'his share' and 'the property' have reference to the oblation, the share and the property of the lord, or husband mentioned in the preceding parts of the texts, whose estate is to be inherited, and not to the husband or lord whose estate is not to be inherited, such as the husband or lord of the daughter or the mother, as the case may be, of the deceased owner, who in default of a widow may be next in succession to inherit an estate. "

These verses, though not applicable to the succession of the mother in so far as they impose the condition of chastity, it is contended, are extended to the succession of females generally by Verses 30 and 31 of Chapter XI, S. II, of the Dayabhâga.

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But the Privy Council have held that they so extend only the rule applicable to a wife that a gift, sale, or mortgage of the estate is not to be made, and that after her death the heirs of the deceased owner are to take, and not that part of the rule, which is included in the words " keeping unsullied the bed of her lord."[1] *Moniram Kolita* v. *Keri Kolitani.*[1]

The theory of religious efficacy is thus only extended to other female owners to restrict their powers of alienation and to make their succession only an interposition to pass the estate to the next heir of the last male owner. It is not so extended by these texts as to impose the obligation of chastity as a condition precedent to succession. This is admitted by the Calcutta High Court, but they hold that it is the commentary of Raghunandana " a high authority in the Bengal School " according to that High Court, read with the other texts that leads to the exclusion of the unchaste mother and daughter.

When the texts and the Dayabhaga according to their Lordships of the Privy Council do not lead to that conclusion, their extension by a recent commentator—for Raghunandana is believed to have lived in Bengal in the 16th century—cannot be followed unless he has been accepted as an authority in this Presidency. He wrote for a different state of society under Mahomedan rule or influence, while Southern India was under Hindu rule, and I am not aware that his sole authority has been accepted on any questions in this Presidency. I see therefore no reason to differ from *Kojiyadu* v. *Lakshmi.*[2]

The only other ground of exclusion alleged in the plaint is loss of caste. That the defendant is expelled from caste is not found by the lower Court, nor is it proved by any evidence in this case.

It was then argued that though adultery with a person of the same or higher caste might not cause degradation, yet in its aggravated form, that is, with a person of a lower caste or with one not a Hindu, it makes the person 'degraded' according to the Hindu Law and is, therefore, a legal disqualification.

For this proposition no authority has been cited. It was not apparently raised in the lower Court and no evidence adduced to

1. (1880) I. L. R. 5 C. 776 at 787. 2. (1882) I. L. R., 5 M. 149.

show that the defendant has been treated as one 'degraded' by her caste on account of her unchastity; and evidence of 'degradation,' if true, should have been forthcoming, as her son appears to have left his house in 1897 on account of her criminal intimacy with Sheik Abdul Khader, which seems from the plaintiff's evidence to have been open and notorious.

Further, when this case came before this Court for decision on the preliminary questions, it was held that the rules regarding loss of proprietary rights as incident to degradation cannot now be treated as otherwise than obsolete. I agree in that view and in the reasoning that led to it.

I would, therefore, reverse the decree of the lower Court and dismiss the suit with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis and Mr. Justice Sankaran Nair.

Ramkrishna Aiyar and others .. Appellants* (*Some Defendants.*)

v.

Krishna Aiyar and others .. Respondents (*Plaintiffs & some Defendants*).

C.P.C., Ss. 28, 45—Misjoinder of causes of action—Suit for partition by co-sharers melvaram—Kudivaramdars parties—Partition suit—Debtors—Parties.

A suit for partition by some of several co-sharers of the melvaram in which the kudivaramdars also are impleaded with a view to the settlement of the relative rights of the melwaramdars and the kudivaramdars is bad for misjoinder of causes of action.

Obiter :—A suit for partition impleading the debtors of the family with a view to the determination of the nature and amount of the debts so as to bind the debtors, is bad for misjoinder of causes of action.

Appeal from the decree of the Court of Trichinopoly in O. S. No. 29 of 1903.

Sir V. Bhashyam Aiyangar for appellants 2, 4, 6, and 10.

T. V. Muthukrishna Aiyar and *C. Govinda Nair* for respondents 1 to 4, 6 to 15 and 17 to 43.

V. Krishnaswami Aiyar for respondents 9 to 20.

* S. A. No. 178 of 1905. 7th January 1908.

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Sir V. C. Desikachariar for respondents 1 to 4 and 6.

V. C. Seshachariar for respondents 7, 8, 10, 17 and 18.

T. Desikachariar for respondents 1 to 5.

The Court delivered the following

JUDGMENT :—This is an appeal from a decree of the District Judge, Trichinopoly. In the plaint the plaintiffs set out that melvaram rights in the suit village have been divided into 40 shares of which they have acquired $11\frac{5}{8}$ shares by purchase, while they are also usufructuary mortgagees of ten shares. They state further that in these circumstances they have had great difficulty in recovering their rents and that they have been led to sue for partition. They pray, therefore, for a declaration that they are entitled to the shares above mentioned and that land proportionate to such shares may be ascertained and set apart for them, and that they may be placed in exclusive possession thereof, that is to say, that melvaram rights in certain specified lands may be allotted to them in respect of their shares. So far, the plaint appears to be in order, whatever practical difficulties there may be in carrying out the partition prayed for. The plaintiffs, however, have joined not only their co-sharers in the melvaram rights, but also the ryots or kudivaramdars of the village as defendants. The latter, it is stated, have been joined not only in order that they may be bound by the decree effecting a partition between the melvaramdars, but also for the purpose of determining and definning a number of questions raised in the plaint as to the rights of the melvaramdars against the ryots or kudivaramdars. Several of the defendants whilst admitting the plaintiffs' rights to the partition prayed for have questioned their right to raise these questions in the present suit, and the point is covered by the latter part of the 1st issue which is in the following terms :—" Can the rights and liabilities of the tenants be decided in this suit ? " The District Judge would appear to have overlooked this issue as it is not dealt with in his judgment, and he has proceeded without considering it, to determine the various issues relating to the disputes between the melvaramdars and the ryots. It might be, no doubt, convenient for the purposes of carrying out the partition to ascertain the exact rights of the melvaramdars as against the ryots, just as in a suit for the partition of joint family property or in an administration suit it might be convenient to ascertain the

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precise amount of debts due to the estate, but it has never been suggested that in the latter cases all the debtors to the estate could be made parties and the amount of their debts recovered or established by a binding declaration. Such a joinder of different causes of action would clearly be inadmissible, and we think the present plaint appears to be open to the same objection. It certainly cannot be said to be necessary for the purpose of effecting the partition and giving the plaintiffs the relief prayed for to determine as between the melvaramdars and the ryots and the terms on which each of the ryots holds his lands under the melvaramdars. As it is not abosolutely necessary for the purpose of effecting the partition, we are of opinion that a course which involves the joinder of so many causes of action between different parties cannot be supported. The practical objection to such a course appears from the evidence in the present case which has been fully discussed before us, which it would not be safe to act on generally, while it would be very difficult to apply it to the case of every individual ryot. The decree in *Ramanuja* v. *Virrappa*, [1] as we understand it, is not inconsistent with this view. It is, however, the well established practice in a suit for partition to add persons claiming to be in possession as alienees of the property sought to be partitioned, and this practice is certainly justified by convenience. A question of this sort is raised in the 14th issue as to a claim of the ryots to the melvaram rights of certain lands in the village. We think the question was rightly gone into by the District Judge but we are unable to agree with the conclusion at which he has arrived. It is in evidence that many years ago the ryots refused to pay rent for the lands on the ground that the melvaramdars had taken possession of certain other lands of exactly the same extent in the village which are still in their possession. The melvaramdars appear not to have demanded any rent subsequently and to have relinquished the claim to the rent in consideration of their being allowed to continue in possession of the other lands. On the whole we think the plaintiffs have failed to prove the melvaram rights they claim in these lands and they must accordingly be excluded from the decree. The decree must also be modified by striking out the words from "this Court doth declare (1) that on all crops" etc., down to "entitled to a share in the crop." All these

1. (1882) I. L. R. 6 M. 90.

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declarations must be omitted for the reasons already given. It follows that the words "with reference to their rights as above declared" must also be struck out, Under the circumstances we think that in the lower Court each party should bear his own costs and in appeal the appellants will get their costs from the respondents who are plaintiffs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro.

Venkoba Rao	..	Petitioner*
v.		(*Defendant*).
S. Muthu Aiyar	..	Respondent
		(*Plaintiff.*)

Venkoba Rao v. Muthu Aiyar.

Provincial Small Cause Courts Act, Art. 31—Suit for share of mesne profits wrongfully received—Jurisdiction.

A suit for the share of mesne profits alleged by the plaintiff to have been wrongfully received by the defendant falls under Art. 31 of the Provincial Small Cause Courts Act, and is consequently not cognizable by a Court of Small Causes.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the District Munsif of Valangiman in S. C. S. No. 406 of 1906.

T. R. Venkatarama Sastri for petitioner.

V. Viswanadha Sastri for respondent.

The Court delivered the following

JUDGMENT:—The question for determination is whether the suit is cognizable by a Court of Small Causes. The plaint begins by describing the suit as a suit for the value of paddy wrongfully carried away by the defendant. It then goes on to state that certain land had been hypothecated to the plaintiff in 1896 by one A. Kilakodayan, and afterwards sold by the latter to the defendant; that the plaintiff got a decree on the hypothecation bond, purchased the land in execution and got delivery on the 19th November 1905; that at the time there were crops on the land which had been raised by the defendant; and that the defendant though entitled to only one-sixth of the crops as *waram*, wrongfully reaped and carried away the whole produce. The suit as brought is, in my opinion, exempted from the cognizance of a Court of Small Causes

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*C.R. P. No. 555 of 1906. 17th January 1908.

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under S. 31 of the Second Schedule of Act IX of 1887, being a suit for the profits of immovable property, belonging to the plaintiff which have been wrongfully received by the defendant; vide *Damodar Gopal Dikshit.* v. *Chintaman Balkrishna Karve* [1] where it is pointed out that when a plaintiff alleges that the defendant has wrongfully received the plaintiff's share of profits, the suit falls under S. 31. I therefore set aside all the proceedings in this suit and direct that the plaint be returned for presentation to the proper Court. No costs are allowed as the defendant should have appeared and pressed the objection in the Court below.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Miller.

Alagu Ambalam and others .. Petitioners

(*Accused Nos.* 1 *to* 14 *and* 17 *to* 24).

Alagu Ambalam. *In re*

Cr P.C., S. 407—Withdrawal of appeal—Part-heard appeal—Withdrawal—Omission to examine witnesses summoned by Court from which the appeal was withdrawn.

It is competent to a District Magistrate to withdraw part-heard appeals from the file of a First Class Magistrate subordinate to him under S. 407, Cr. P. C.

The Court to which an appeal is transferred for disposal is not bound by any opinion as to the necessity for taking further evidence formed by the Court from which the appeal was withdrawn.

Petition under Ss. 435 and 439 of the Criminal Procedure Code praying the High Court to revise the order of the Additional District Magistrate of Madura in Cr. A. No. 41 of 1907 presented against the order of the 2nd class Magistrate's Court, Tirupattur Taluq, in C. C. No. 265 of 1907.

P. R. Sundara Aiyar and *C. V. Ananthakrishna Aiyar* for petitioners.

The Public Prosecutor (*E. B. Powell*) for the Crown.

K. N. Aiya Aiyar for complainant.

The Court passed the following

ORDER :—In this case a criminal appeal against a conviction by a Second Class Magistrate was presented to the first Class Sub-Divisional Magistrate. After partly hearing the appeal he

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* C. Rev. C. No. 896 of 1907. 13th February 1908.
C. Rev. P. No. 294 of 1907.

1. (1892) I L. R. 17 B. 42.

Alagu Ambalam. *In re*

resolved to examine certain persons as Court witnesses and issued summons to them. Thereupon one of the parties to the appeal petitioned the Additional District Magistrate to transfer the appeal to another Court, alleging that the examination of further witnesses was wholly unnecessary. The Additional District Magistrate, after hearing the appellants and the complainant, transferred the appeals to his own file, and, without examining the further witnesses, disposed of the appeal, confirming the conviction.

We are asked now, as a Court of Revison, to set aside the proceedings of the Additional District Magistrate on two grounds; *first*, that he had no jurisdiction to transfer an appeal which had been partly heard by the Sub-Divisional Magistrate and, *second*, that if he had power to make the transfer he was bound to examine the witnesses to whom the Sub-Divisional Magistrate had issued summons.

We do not think that there is any ground for either contention. No decision on the point is cited, and we are not aware that any exists. The petitioners rely on the analogy of the case of *Kumarasami Reddiar* v. *Subbraya Reddiar* [1] in regard to certain civil appeals, but we do not think that that case has any bearing on the present question. To decide the present question, we must look to the terms of the Criminal Procedure Code. S. 407 provides for an appeal, in cases like the present, to the District Magistrate, and adds that "if the District Magistrate so directs, any appeal or class of appeals may be presented to and heard by a First Class Magistrate subordinate to him and empowered by the Local Government to hear such appeals." It furthur provides that "the District Magistrate may withdraw from such Magistrate any appeal or class of appeals so presented." There is no limitation in the section or elsewhere in the Code of Criminal Procedure on this power of withdrawal, and we should not be justified in introducing a limitation in respect of part-heard appeals, which the legislature has not thought fit to enact.

As observed by the Privy Council in the case of *Gokul Mandar* v. *Pudmanund Singh* [2] "the essence of a Code is to be exhaustive on the matters in respect of which it declares the law, and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its construction." If the legislature

1. (1889) I. L. R. 23 M. 314. 2. (1902) 29 I. A. 196.

desired to impose the suggested limitation, it would have found no difficulty in enacting it. Moreover, the power of withdrawal is given with a view to promote the ends of justice and the convenience of parties; and there is no reason why the promotion of these objects should be barred in the case of part-heard appeals.

The second objection is equally untenable. Under S. 428 of the Code of Criminal Procedure the appellate Court, if it thinks additional evidence necessary, may take such evidence before deciding the appeal, but there is nothing in the Code of Criminal Procedure or in reason to render it illegal or irregular for the appellate Court to dispense with such evidence if further consideration or argument leads the Court to the conclusion that such evidence is not necessary. The Court to which an appeal is transferred for disposal, and on which the responsibility for its correct disposal rests, is certainly not bound by any opinion as to the necessity for taking further evidence formed by the Court from which the appeal was transferred, and which is no longer responsible for the decision of the appeal.

We dismiss the petition.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Miller.

Aiyasami Aiyar .. Appellant*
v. (*3rd Plaintiff*).
The District Board, Tanjore, and two others .. Respondents
(*Defendant* and *1st and 2nd Plaintiffs*).

Local Boards Act,—Madras Act V of 1884—Duty of maintaining roads—Improvement of tunnels and culverts under the road—Damage to adjacent owners.

An authority to construct a road carries with it the authority to construct the water-ways necessary to enable the road to be carried safely across the drainage of the country, and the same rule applies to roads vested in District Boards by Act V of 1884 (the Madras Local Boards Act).

Act V of 1884 enjoins the maintenance of roads vested in it and does not confine the Board to its maintenance as originally designed or executed; and in the absence of any such express restriction, the injunction to maintain, imposes the duty to

* S. A. No. 584 of 1904. 8th January 1908.

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provide such new works as it may be found necessary from time to time to provide in order that the road may be properly maintained. The duty cast upon the District Board of maintaining the road necessarily involves the duty of maintaining the necessary culverts and tunnels under it and of making such improvements in them as may be found essential for the purpose.

Held also :—That, in the absence of proof that the District Board could have constructed a culvert at any other part of the road, which, while effective to protect the road, would have done no injury to the plaintiff's lands, the plaintiffs were not entitled to an injunction.

Second Appeal from the decree of the Subordinate Judge's Court of Kumbakonam in A. S. No. 764 of 1903 presented against the decree of the Court of the District Munsif of Mayavaram in O. S. No. 185 of 1902.

T. V. Seshagiri Aiyar and *B. Govindan Nambiar* for appellant.

V. Krishnaswami Aiyar for respondents.

The Court delivered the following

JUDGMENT :—The plaintiffs on behalf of themselves and other land-holders seek for a permanent injunction restraining the District Board of Tanjore from increasing the size of two tunnels or culverts passing under a public road. The road runs from north to south, and for a part of its length on the west side of it, and running parallel with it, there is an irrigation channel called the Pallavan Channel; it is in this part of the road that the two tunnels in question are situated, and water from the Pallavan Channel passes through them under the road and is used for the irrigation of the seed beds of the plaintiffs and other landholders, lying on the east side of the road. These two tunnels having fallen into disrepair the District Board, the authority responsible for the maintenance of the road, decided, in repairing them, to increase their size, the object being to allow a greater volume of water to pass through them and thus to prevent the waters on the west side of the road from rising in the rainy season to such a height as to damage the road surface. The complaint of the plaintiffs is that the increased volume of water discharged by the tunnels is, or is likely to be, too great to be carried off by the channels on the east side of the road, and that consequently their fields will be submerged and their crops injured.

Both the lower Courts find that they will be injured in the way they allege, and the question is, therefore, whether they are in these circumstances entitled to the injunction for which they pray.

We endeavoured by calling for a finding of fact to ascertain whether the tunnels were constructed at or after the time of the construction of the road for the purposes of the road, or whether they existed before the construction of the road as irrigation conduits or pipes. The Subordinate Judge has, however, been unable to find any evidence sufficient to establish either position, and is able only to find that for fifty years or so the tunnels and the road have existed together without alteration in the dimensions of the former.

We must take it, then, that the road was vested in the Local Fund Board by S. 8 of Madras Act IV of 1871 and transferred to the District Board by S. 4 (iii) of Act V of 1884, and that when it first vested in the Local Fund Board the two tunnels now in question were in existence.

It seems to be accepted by both sides that the injury to which the plaintiffs' lands are liable will be caused, if caused at all, by the waters of the Pallavan Channel; that there is no finding whether it will be caused when the water in the channel is at its normal level in the irrigation season, or when it is at its ordinary seasonal flood level, or only at a time of extraordinary flood.

There is some evidence and a finding by the Subordinate Judge that injury is done annually to the road in the rainy season, but on the question of the injury done to the plaintiffs' lands the only evidence referred to by the District Munsif showed that even in a time of 'unprecedented' rain, a protective bank on the east side of the road was sufficient to prevent any damage. The findings of fact being in many respects wanting in precision the case has been argued by both sides upon the footing that the District Board, to make a successful defence, must rely on the powers conferred upon it by the Local Boards Act V of 1884, and we deal with the matter on this footing.

Mr. *Seshagiri Aiyar* contends that the power given to the Board to construct culverts under their roads, if it exists at all, is merely permissive, and can be exercised only in such a way that no injury is done to others. But this contention will not bear examination. By S. 95 of Act V of 1884 (Madras) the District Board is directed to provide, so far as its funds allow, for the construction, repair and maintenance of roads, bridges and other

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means of communication. The road in question is, it is not denied, one of the roads to which the provisions of this section are applicable, and even assuming that a culvert or tunnel is neither a 'bridge' nor a 'means of communication,' it is vested by S. 50 of the Act in the District Board, and it is clearly impossible, or so it seems to us, for the Board to maintain the road passing over a culvert or tunnel unless it, at the same time, maintains the culvert or turnel which by the Act is vested in it. The duty cast upon the Board of maintaining the road necessarily involves, then, the duty of maintaining the necessary culverts and tunnels under it. It can hardly be denied that an authority to construct a 'road' carries with it the authority to construct the water-ways necessary to enable the road to be carried safely across the drainage of the country, and we did not hear from Mr. *Seshagiri Aiyar* any argument which should lead to the application of a different rule in the case of a road which was vested ready-made in the District Board in 1884. If in order to 'maintain' such a road it is necessary to improve the water-ways, it seems to us that there is imposed upon the District Board the duty of making the necessary improvements. Mr. *Seshagiri Aiyar* relied upon the judgment of Sir *Subrahmanya Aiyar* J. in *Sankaravadivelu Pillai* v. *Secretary of State for India in Council*[1] and likened the culverts or tunnels in the present case to the 'bye-wash' dealt with in that case. He argued that they are to be treated as 'new works' constructed under an authority which is "in the strict sense of law permissive."

We think the two cases are distinguishable. In the case before us the statute enjoins the maintenance of the road and does not confine the Board to its maintenance as originally designed and executed; and, in the absence of any such express restriction, we are of opinion that the injunction to maintain imposes the duty to provide such new works as it may be found necessary from time to time to provide, in order that the road may be properly maintained.

There is no resemblance between the present case and the case of *Canadian Pacific Railway* v. *Parke*[2] in which *Lord Watson* makes use of the phrase "in the strict sense of law permissive." In that case the authority was given to the defendant for his own

1. (1905) I. L. R. 28 M. p. 72. 2. (1899) A. C. p. 535.

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benefit ; here it is given solely for the benefit of the public ; the District Board makes no profit out of the roads. There, having got the water to his land, the defendant was entitled to use it or not, as he pleased, in irrigating that land or any part of it : here, it is the duty of the Board to provide, so far as its funds admit, for the proper maintenance of the road. The cases are far apart. The case before us is nearer to the case of *London, Brighton and South Coast Ry. Co.* v. *Truman*,[1] where for the purposes of the cattle traffic on the railway the Company was authorised to acquire land for, and to construct, cattle docks and yards—which, when constructed, formed, as Lord Watson says in *Canadian Pacific Railway* v. *Parke*,[2] "just a part of the railway" which it was the business of the Company under its statute to make.

The case of *Cracknell* v. *Mayor, &c., of Thetford*,[3] may also be referred to in this connection.

It may, no doubt, be suggested that in these cases the work done was expressly authorised by the statute, but we do not think that makes any real difference : in the present case, as we have endeavoured to show, the power is given by necessary implication. Mr. *Seshigiri Aiyar* suggested that we cannot imply more than a mere permissive authority in the present case, because it was not incumbent on the District Board to put a culvert in the place which was selected for it ; but the case of *London, Brighton and South Coast Ry. Co.* v. *Truman*[1] is sufficient authority for the contrary view. We may also refer to the opinion expressed by Sir *George Jessel* in *Hawley* v. *Steele*[4]—a case where land acquired for purposes of the defence of the realm was utilized for rifle-shooting in such a way as to be a nuisance to a resident in the vicinity. The Master of the Rolls was of opinion that " the power conferred upon the military authorities was a legal right to the use of the land for that purpose, although such a use would, without the authority of Parliament, have been illegal. If that is so, it is impossible to maintain an action for nuisance." And he pointed out that it was not for the Court to decide for what purpose any particular part of the land was to be used.

It is found that action was necessary to prevent the annually recurring injury to the road, and it is found that to accomplish

1. (1886) 11 A. C. p. 435
2. (1899) A. C. 55.
3. (1869) L. R., 4 C. P., p. 629.
4. (1877) 6 Ch. D. p. 521.

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this object three courses were open: (1) to raise the road-way; (2) to construct a bank along the west side of the road; and (3) to enlarge the water-ways The first two courses are practically identical in effect, and it is not clearly found that either of them by itself will be effective to prevent the mischief: the Subordinate Judge, who accepts the District Munsif's finding, seems to take it that it was necessary both to raise the road and widen the tunnels, and this is, we think, the effect of the District Munsif's finding and of the evidence to which he points in support of it. It is obvious that in the case of an embanked road the raising of the surface to any great extent, or the raising of one side of the road, may involve the narrowing of the road to an extent which impairs its utility, and that, in the present case, to erect a bank separate from the road along its western side may be impracticable from want of room, or so expensive that the funds of the District Board will not admit of its being done. There is, therefore, nothing apparently unreasonable in the finding that the extension of the water-ways was necessary in the interests of the public for the maintenance of the road. There was no negligence in the carrying out of the work, and the plaintiffs have not shown that the Board could have constructed a culvert at any other part of the road which, while effective to protect the road, would have done no injury to the lands on the east side of it.

We dismiss the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Munro.

Venkobachar	..	Appellant*
v.		*(Petr.-3rd Deft.)*
Raghavandrachar	..	Respondent
		(Plaintiff.)

Venkobachar v. Raghavandrachar.

Limitation Act, Art. 169—Applicability—No service on respondent—Service without declaration under S. 82, C. P. C.—No good service.

Art. 169 of the Limitation Act has no application to cases where the respondent had no notice of the appeal itself.

Where the respondent refuses to accept service or cannot be found, it is the duty of the Court, before proceeding with the appeal, to declare that the notice had been duly served, and there is no sufficient service in law where there has been no such declaration under S. 82, C. P. C.

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* A. A. O. No. 120 of 1907. 31st January 1908.

Venkobachar v. Raghavandrachar.

Appeal from the order of the District Court of Salem on M. A. No. 144 of 1906 in A. No. 269 of 1904.

T. Subrahmania Aiyar for appellant.

S. Rajagopala Aiyangar for the *Advocate General* (*P. S. Sivaswami Aiyar*) for respondent.

T. Subrahmanya Aiyar.—Art. 169 will apply only when there has been due service. "In the absence of the respondent" implies that he (defendant) could be present if he chose. If he is not served, how could he be present? C. P. C., S. 553, makes the procedure in Chap. VI, applicable to appeals. It is the Court's duty under S. 82 to declare sufficiency of notice. Until service or declaration of sufficiency of service, the Court cannot hear the appeal. Cf. the procedure under S. 100. Without the declaration under S. 82 there is no *service.*—*Nusur Mahomed* v. *Kazbai.*[1] The Court has an inherent power to rectify an error. [*Munro*, J.—Why should S. 560 not apply? The words "if the notice was not duly served" cover this case.] It will; but, even if otherwise, the Court has inherent jurisdiction.

S. Rajagopala Aiyangar.—Art. 169 applies to all cases to which S. 560 applies. "*Exparte* in the absence of" is common to both. The natural meaning of *ex-parte* is "in the absence of and without notice to"—*vide* Legal Encyclopædia, Vol. II., Definition of *ex-parte.* The reason for the difference between Art. 164 and Art. 169 supplies also the justification for this construction. A party may not know of a suit; but, having known of the suit, he is likely to inquire and likely to come to know of the appeal. S. 560 shows that '*exparte* in the absence of' includes cases of "no due service."

The Court delivered the following

JUDGMENT:—The District Judge has dismissed the application as barred by limitation. The appellant's case is that he never had any notice of the appeal. The return on the notice is that it was tendered to the younger brother of the appellant. Under S. 82 of the Civil Procedure Code it was the duty of the Court before proceeding with the appeal to declare that the notice had been duly served. This the Court, as the record shows, did not do, and without such declaration there is no sufficient service. If, in fact, the appellant had no notice of the appeal, Art. 169 of

1. (1886) I. L. R. 10 B. 202.

Schedule II of the Limitation Act can have no application. We, therefore, set aside the order of the District Judge and remand the case for disposal on the merits. Costs will abide and follow the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.
(*FULL BENCH.*)

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Wallis and Mr. Justice Sankaran Nair.

Randupurayil Kunhisow, Karnavan and Manager of his Tarwad .. Appellant* (*Plaintiff*).

v.

Neroth Kunhi Kannan and others .. Respondents (*Defendants*).

Kunhisow v. Nerath Kunhi.

Madras Acts—Malabar Compensation for Tenants' Improvements Act—S. 7 of Act VII of 1887 and S. 19 Act I of 1900—Scope of—Improvements effected after 1886 in virtue of contracts made prior to 1886.

S. 7 of the Malabar Compensation for Tenants Improvements Act, VII of 1887, (reproduced as S. 19 of Act I of 1900) precludes parties from contracting themselves out of the Act by any contract made after January 1st, 1886; but it does not affect the validity of contracts made prior to that date, whether the improvements were made before or after January 1886, in which case the rate of compensation is governed by the terms of the contract itself

Second Appeal from the decree of the District Court of North Malabar in A. S. No. 39 of 1905 presented against the decree of the Court of the District Munsif of Kutuparamba in O. S. No. 534 of 1904.

This second appeal coming on for hearing in the first instance before Sir *Charles Arnold White*, Chief Justice, and Mr. Justice *Miller*, their Lordships made the following

†ORDER OF REFERENCE TO A FULL BENCH:—The effect of the decision in *Viru Mammad* v. *Krishnan*,[1] appears to us to be that the rate of compensation to which a tenant is entitled for improvements effected after January 7th, 1887—the date of the coming into operation of The Malabar Compensation for Tenants' Improvements Act, 1886—is governed by the Act notwithstanding that a special contract was subsisting with

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* S. A. No. 1109 of 1905. 4th February 1908.

† 9 January 1908.

1. (1898) I. L. R. 21 M. 149.

Kunhisow v. Neiath Kunhi.

reference to the rate of compensation at the date the Act came into operation. We find a difficulty in following this decision, and it appears to be inconsistent with the observation of the Full Bench in *Kerala Varmah Valia Rajah* v. *Ramunni*. [1] We accordingly refer the following question to a Full Bench :—

In the case of a contract made prior to January 1st, 1886, is the rate of compensation which a tenant is entitled to receive governed by the terms of the contract or by the provisions of The Malabar Compensation for Tenants' Improvements Acts of 1887 and 1900 ?

V. Ryru Nambiar for appellant.

C. Madhavan Nair for respondent.

V. Ryru Nambiar.—The contract of lease was entered into in 1881. Though all the improvements were effected after the coming into force of the Act VII of 1887, as they were all executed in pursuance of the contract of 1881 the tenant cannot claim more than the rate fixed by the contract. The Full Bench decision of *Kerala Varmah Valia Rajah* v. *Ramunni* [1] seems to favour my contention. That decision implies that if there was a contract for improvements before the passing of the Act, the terms of the contract would govern the value for the improvements, even if effected after the Act. *Viru Mammad* v. *Krishnan* [2] also supports my contention. It lays down the rules with regard to improvements effected before and after the Act. [*Wallis* J. That decision says that contracts made after the Act are invalid. Where does it appear that there was any contract before the Act ?] The printed papers show that some of the improvements were made before the Act.

C. Madhavan Nair.—S. 7 of Act VII of 1887 clearly lays down that any improvements effected from 1887 ought to be governed by the Act. This Act was passed to safeguard the interests of the tenant as against the landlord. The former cannot contract out of those rights. See also S. 7 of Act VII of 1887 and S. 19 of Act I of 1900. The wording in both is the same. The Acts clearly lay down that full market value must be paid for the improvements. The only question for consideration is : When were the improvements effected ? [*Sankaran Nair* J.—The argument is that S. 19 only refers to contracts made after the Act.] *Malikan* v. *Shankunni* [3] clearly lays down that notwithstanding

1. (1893) 3. M. L. J. 52.   2 (1898) I. L. R. 21 M. 149.

3. I. L. R. 13 M. 502.

Kunhisow v. Nerath Kunhi.

the existence of any contract prior to the Act, the provisions of the Act alone must govern. All contracts before 1887 are null and void after the Act of 1887. Moreover, the point did not directly arise in the Full Bench decision of *Kerala Varma Valia Rajah* v. *Ramunni.*[1] It is *obiter dictum.* It simply lays down that customary rates ought not to be enforced. The contract in that case was that customary rates shall be enforced. Special rates entered into by the parties were held affected by the decision. The intention and policy of the legislature ought to be looked to.

The appellant was not called upon to reply.

The Court delivered the following

OPINION :—We are of opinion that S. 7 of the Act of 1887, which is reproduced as S. 19 of the Act of 1900, precludes parties from contracting themselves out of the Act by any contract made after January 1st, 1886, but that it does not affect the validity of contracts made prior to January 1st, 1886, whether the improvements were made before or after the coming into operation of the Act of 1887. As regards *Viru Mammad* v *Krishnan*[2] a reference to the printed papers shows that the contracts of the defendants other than the 6th defendant were in fact made after January 1st, 1886. We are unable to agree with the decision in *Malikan* v. *Shankunni.*[3]

Our answer to the question which has been referred to us is that in the case of a contract made prior to January 1st, 1886, the rate of compensation is governed by the terms of the contract.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

(APPEAL FROM THE CALCUTTA HIGH COURT.)

Present:—Lord Robertson, Lord Collins and Sir Arthur Wilson.

Raja Rai Bhagwat Dayal Singh & others .. Appellants.*

v.

Debi Dayal Sahu and others .. Respondents.

Dayal Singh v. Dayal Sahu

Champerty—Applicability to India—Assignee suit by, for possession against third party—Consideration for assignment—Hindu Law—Widow, alienee from—Reversioner's suit—Decree, form of—Onus of proving genuineness and validity of consideration—Contract Act, S. 106—Ratification, essentials of—Accounts.

Champerty does not avoid transactions in India.

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* 24th January 1908.

1. (1893) 3 M. L. J. 52.
2. (1893) I. L. R. 21 M. 149.
3. (1898) I. L. R. 13 M. 502.

Dayal Singh v. Dayal Sahu.

The question of an assignment being unfair and unconscionable is purely a question between the assignor and the assignee. A third party who is sued by the assignee on the title derived from the assignment cannot raise the issue of the unfairness or unconscionableness of the assignment.

One who claims a title under a conveyance from a woman, with the usual limited interest which a woman takes, and who seeks to enforce that title against reversioners, is always subject to the burden of proving not only the genuineness of his conveyance, but the full comprehension by the limited owner of the nature of the alienation she was making and also that that alienation was justified by necessity, or at least that the alienee did all that was reasonable to satisfy himself of the existence of such necessity. And this burden lies the more heavily on one who comes into court with the case that he did not take it from a limited owner, but from one whose title was adverse to that owner.

Ratification, in the proper sense of the term, as used with reference to the law of agency, is applicable only to acts done on behalf of the ratifier, and a woman with a limited interest cannot by acts *ex post facto* charge upon the estate which she represents an obligation not originally binding upon it.

Held also :—that in a suit for possession by a reversioner or his assignee against a purchaser from a Hindu widow, on the ground that the sale was not good as such, there being no legal necessity for the same, the proper decree to be passed in case the Court should find in favor of the plaintiff would be one for possession conditional upon the payment by the plaintiff of the sums found to have been advanced for legitimate necessities; and that the plaintiff was entitled to mesne profits and the defendant to 6 per cent. interest on such portion of the consideration as might be found binding on the reversion.

Two consolidated appeals from two decrees of the High Court of Judicature at Fort William, in Bengal, (July 20, 1903) modifying two decrees of the Court of the Subordinate Judge of Zillah Ranchi (December 20, 1899) and dismissing the appellants' suits with costs.

The main questions raised in the appeal were whether the suits were maintainable on the ground of champerty and maintenance, and whether two deeds of sale executed by certain Hindu ladies were valid and binding on the male reversioners to the estate of the last male owner in possession.

The following pedigree will help to explain the facts of the case :—

Ram Baksh Singh
- Chattardari Singh
  - Raghubhar Dyal Singh
    - Jagarnath Dyal Singh
      - Rai Bhaghwat Dyal Singh, Plaintiff 1.
- Tilakdhari Singh
  - Kalicharan Singh
  - Ram Saran Singh
    - Narayana Singh
- Pehelwan Singh
  - Bhan Pertab Singh
  - Kirpa Narayan Singh

(Plaintiffs 2 and 3.)

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Of the persons named in the above pedigree Tilakdhari Singh was the owner of the villages Lalgara, Chiyanki and Ganka, the subject matter of the suits, and others. He died in 1868, and was succeeded by his son, Ram Saran Singh, his other son, Kali Charan Singh, having predeceased him. Ram Saran Singh died on February 7, 1879, and was succeeded by his infant son, Narayan Singh, who died, while still an infant and unmarried, on August 7, 1879, leaving him surviving his step mother, Mussamat Etraj Koer, the widow of Ram Saran Singh, as also his grandmother, Mussamat Jalet Koer, the widow of Tilakdhari Singh, and Mussammat Aprup Koer, the widow of Kali Charan Singh. The male members of the family then alive were Rai Bhagwat Dyal Singh, Bhan Pertab Singh, and Kirpa Narayan Singh.

On February 10, 1877, Ram Saran Singh granted to the respondent, Debi Dayal Sahu, a Zurpeshgi lease of certain lands in the village Lalgara, for a term of five years at an annual rental of Company's Rs. 2, "in lieu of a loan of money under a bond, and expenses amounting to Company's Rs. 600, which is filed as Zurpeshgi money."

On January 19, 1887, the three Mussammats sold the villages of Chiyanki and Ganka to Debi Dayal Sahu, and executed a deed in his favour. The consideration was Rs. 20,196-5-0 made up as follows:—

1.	Principal and interest due under deed, dated March 9, 1880	Rs.	6,200	0	0
2.	Principal and interest due under deed, dated August 20, 1885 ..	,,	13,068	5	0
3.	On account of expenses ..	,,	50	0	0
4.	Principal and interest due under bond, dated September 24, 1885 ..	,,	398	0	0
5.	Paid in cash	,,	1,200	0	0
		Rs.	20,916	5	0

It recited that "these debts were incurred for the purpose of meeting legal and *Shastric* expenses, and it is proper and necessary under every circumstance for us (the three ladies), the declarants, to pay it off; and the interest of the said money is daily increasing whereby it is apprehended that the properties held by

us, the declarants, shall be ruined and destroyed, and besides this, money is also due to several other creditors. For this reason there is no other means whereby this heavy debt and debts due to the other creditors can be paid off by us, the declarants. Therefore, under these circumstances, except by transferring a portion of the properties held by us, it is impossible to pay off the aforesaid debts in any other way." Dayal Singh v. Dayal S.

On May 15, 1891, the three Mussammats executed in favour of N. A. Hodges a deed whereby they sold the village of Lalgara to him for a consideration of Rs. 34,000 made up as follows:—

	Rs.	A.	P.
1. Paid to Hanuman Singh on account of principal and interest due to him under the mortgage deed, dated September 11, 1888	13,136	10	0
2. Paid to the Sahus on account of principal and interest due under three mortgage deeds, dated February 10, 1887; March 9, 1880; and October 16, 1890 ..	2,340	0	0
3. Paid to Akhouri Gokhulnand ..	801	4	6
4. Paid to Nandram Dubey on account of principal and interest due under the mortgage deed dated January 27, 1886..	6,800	0	0
5. Paid in cash	10,922	1	6
Rs.	34,000	0	0

The deed recited, *inter alia*, that "Rs. 40,000 or 42,000 is due to the creditors by us, the declarants; but, we, the declarants, could not pay it off up to this moment; and if this debt be not paid off for a short time more, then all the properties held and possessed by us, the declarants, will be sold at auction sale and will be ruined, and it is impossible to pay off such a large debt by any means except by means of transfer of property." Of the consideration it set out that "Rs. 23,077-14-6 has been set off and deposited with the said Sahib, and we have received now the balance of Rs. 10,922-1-6 from the said vendee."

On December 1, 1893, N. A. Hodges executed a deed of sale and conveyed his interest in the village Lalgara to Debi Dayal

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Sahu, Gunpat Sahu, Ram Ratan Sahu, and Ram Pilas Sahu for a consideration of Rs. 40,000.

Mussammat Jileb Koer died on November 22, 1894; Mussammat Aprup Koer died on February 7, 1895. On November 29, 1895, Bhan Pertab Singh and Kirpa Narayan Singh sold the whole of their right, title and interest in the estate of Narayan Singh to Raja Rai Bhagwat Dyal Singh for a nominal consideration of Rs. 52,600, of which sum Rs. 600 was paid in cash to the vendors, and the balance was only payable to them in the event of the vendee's success in obtaining the property in suit.

On August 29, 1898, Raja Rai Bhagwat Dayal Singh, Bhan Pertap Singh, and Kirpa Narayan Singh instituted two suits in the Court of the Subordinate Judge of Ranchi. One of the suits (No. 8 of 1899) related to the village of Lalgara, and the defendants to that suit were Debi Dayal Sahu, Gunpat Sahu, Ram Rattan Sahu, Ram Bilas Sahu, and the executors of N. A. Hodges now represented by the respondent J. W. Sowton. The other suit (No. 9 of 1899) related to the villages Chiyanki and Ganka, and Debi Dayal Sahu was the sole defendant thereto. The pleadings and issues in both suits were similar. The plaint alleged *inter alia* that large property consisting of land and moveables, which passed on the death of the last male owner to his heiress, produced an income of Rs. 10,000 a year. If the deeds of sale of the villages in suit were in fact executed, they were valid only for the life of the executant. The defendants knew or, on inquiry, might have known, that the income derived by Mussammat Jileb Koer from the estate of the last male holder, was more than amply sufficient to meet all her legitimate wants, and all legitimate charges thereon, and that there was no necessity, either in fact or law, for the alienation of the property in suit. The title of Bhan Pertab Singh and Kirpa Narayan Singh to succeed on the death of Mussammat Jileb Koer was acquired by Bhagwat Dayal Singh under the sale deed of November 29, 1895. The prayers of the plaint were for possession to be given to the first appellant, and for mesne profits, a declaration and further and other reliefs.

The defence was *inter alia* that Etraj Koer was in adverse possession of the estate for 12 years and had thereby obtained an

absolute title, and, alternately, that if Jileb Koer took the estate by inheritance, she took an absolute estate as paternal grandmother under the Mitkshara law. That the Mussammats joined in the deeds fully understanding the value and consequence of the transaction and for proper value. "The consideration money obtained by the purchase of the property in suit has been applied to the payment of lawful and necessary debts, and for lawful and necessary purposes." The conveyance to Bhagwat Dayal Singh was without consideration; collusive and fraudulent, immoral and opposed to public policy, being made for the purpose of gambling in litigation.

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Of the issues fixed in suit No. 8 of 1899 it is necessary to mention here only the following:—

"5. Is the Kabala executed by plaintiffs Nos. 2 and 3 in favour of plaintiff No. 1, in November 1895, a *bona fide* and valid deed? Did any consideration pass thereunder?

"6. Were Mussammats Jileb Koer, Aprup Koer and Etraj Koer, the absolute owners of the property in dispute, or was their interest a qualified one?

"7. Is the Kabala, dated the 19th January 1887, executed by the Mussammats in favour of the defendants, a legal and valid document? Was it executed for legal necessities? Did any consideration pass, and did such go to satisfy debts, which constitute legal necessities? Is it binding on the reversioners?"

On December 20, 1899, the Subordinate Judge delivered one judgment in both suits. He decided the fifth issue in favour of the respondents, holding that the conveyance under which the first appellant claimed was gambling in litigation, immoral, and not enforceable on grounds of public policy. He, however, added, the conveyance failing, the title of the vendors, the 2nd 3rd plaintiffs, remained, and that they were entitled to a decree, if the alienations made by the ladies be invalid in law. On the sixth issue he decided that Jileb Koer was solely entitled to the succession to the last full owner and that she took a qualified estate. On the seventh issue he was of opinion that the estate of the ladies had been mismanaged, and that advantage had been taken of their position. He found that legal necessity was proved in regard to the payment of ancestral debts, and for the expenses attendant on the marriage of Ram Saran Singh's

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daughters. In the result he passed decrees for possession in favour of the 2nd and 3rd appellants conditional on the payment to the respondents of the sum of Rs. 11, 198-13-6, and Rs. 6,400 in suits Nos. 8 and 9, respectively.

Both the appellants and the respondents appealed to the High Court of Judicature at Fort William in Bengal. On July 20, 1903, that Court delivered its judgment dismissing the suits with costs. The finding of the Subordinate Judge that the suits were not maintainable by Bhagwat Dayal Singh was affirmed, and on that finding the High Court was of opinion that the suits ought to have been dismissed. It also held that there was legal necessity for the execution of each deed of sale and that they were made for adequate consideration.*

The appellants, thereupon, preferred the present appeals to His Majesty in Council.

Cohen, K. C., and *Brown* for the appellants.

The lower Courts were wrong in holding that the deed of conveyance executed by the 2nd and 3rd appellants in favour of the 1st appellant was void. see *Bradlaugh* v. *Newdegate*[1] and *Alabaster* v. *Harness*,[2] But the English law does not go so far as to upset an agreement of this kind. There is not a single English case to support the view taken by the Courts in India. But in India the English law of maintenance and champerty has never been introduced, and, therefore, the agreement in question is valid—*Ram Coomar Coondoo* v. *Chunder Canto Mukerjee.*[3] Again, in the case of *Kunwar Ram Lal* v. *Nil Kanth*,[4] it is laid down that the English law of Champerty is not in force in India, and documents which set up agreements to share the subject of litigation if recovered, in consideration of supplying funds to carry it on, are not in themselves opposed to public policy. The lower Courts were wrong in holding that this agreement was against public policy. The question of the validity of the agreement could arise only between the parties to it. The respondents are not parties to it, and they cannot question its validity on the ground of it being champertous—*Lal Achal Ram* v. *Raja Kazim Husain Khan.*[5]

1. (1883) 11 Q. B. D. I. *See (1903) I. L. R. 31 C. 433. 2. (1895) 1. Q. B. 339.
3. (1876) L. R. 4 I. A. 23 ; I. L. R. 2 C. 233. 4. (1893) L. R. 20 I. A, 112, 115.
5. (1905) L. R. 32 I. A. 113 ; I. L. R. 27 A. 271.

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The Subordinate Judge was right in setting aside the alienations to the respondents. There is a general prayer of relief in the plaint, and that would cover the decree made by the Subordinate Judge.

A Hindu widow cannot of her own will alienate the property except for special purposes, if there be collateral heirs of her deceased husband. To support an alienation for worldly purposes she must show necessity—*The Collector of Masulipatam* v. *Cavaly Vencata Narrainapah.*[1] * * * * * In order to sustain an alienation by a Hindu widow of the *corpus* of her husband's estate, it must be shown, in a case like this, that there was legal necessity for the alienation, or, at least, that the grantee was led on reasonable grounds to believe that there was. The obligation on the grantee is to inquire and satisfy himself that the widow from whom he is taking a charge upon her husband's inheritance had a proper justification for so charging. This onus is not discharged if the grantee or mortgagee rest content, as the respondents here do, with the vague and misleading statements in the deed. Nor would it be discharged by thinking that he, the mortgagee, is taking title under an absolute owner—*Lala Amarnath Sah* v. *Rani Achan Kuar.*[2] It is for the mortgagee or alienee to allege and prove the circumstances which alone will give validity to the mortgage—*Sham Sunder Lal* v. *Achan Kunwar.*[3] See also *Tacoordeen Tewarry* v. *Nawab Syed Ali Hossein Khan*;[4] *Baboo Kameshwar Pershad* v. *Run Bahadur Singh*;[5] *Tika Ram* v. *Deputy Commissioner of Bara Banki*;[6] and *Deputy Commissioner of Kheri* v. *Khangan Singh.*[7]

The Subordinate Judge was right in holding that the respondents have not discharged the burden of proof that is incumbent upon them to validate the deeds of January 19, 1887, and May 15, 1891. Debi Dayal Sahu himself says : "I cannot say how much did the Mussammats borrow for the suit. I did not enquire how much had Mussammats borrowed for the suit before borrowing from Nand Ram. Rs. 10,900, 1,000, and 4,200 were given to the Mussammats to pay off their creditors. I heard about this.

1. (1861) 8 Moore I. A. 500 at pp. 549-55 ; 2 W. R. P. C. 61.
2. (1892) L. R. 19 I. A. 196 at p. 202 ; I. L. R. 14 A. 420.
3. (1898) L. R. 25. I. A. 183 at p. 191 . I. L. R. 21 A. 71.
4. (1874) L R. 1. I A. 192 ; 21 W. R. 340.
5. (1880) L. R. 8 I. A. 8, 11 ; I. L. R. 6 C. 843.
6. (1899) L. R. 26 I. A. 97 ; I. L. R. 26 C. 707.
7. (1906) L.R. 34. I. A. 72 ; I. L. R. 29 A. 331.

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I made no inquiries about this. I do not know whether Mr. Hodges did not himself keep back the amounts to pay off such creditors. I do not know whether such creditors had bonds. I made no inquiry when I purchased whether such men had bonds." The High Court is wrong on this point. The deeds in question are not valid and binding against the appellants, and the Subordinate Judge has adopted the right mode of dealing with them.

Earlier bonds and mortgages were given by Etraj Koer, who had no interest in the property during the lifetime of Jileb Koer. They were not binding on the appellants. The consideration stated in each of the sale deeds mainly went towards the discharge of debts incurred by Etraj Koer and interest on those debts. They were not, under the circumstances, binding on the appellants.

Sir *Robert Finlay*, K. C., and *De Gruyther* for the respondents:—The other side submitted that whether the agreement was void on the ground of its being champertous was a matter between the parties to it. But that is not so. This is not a deed got out of a party in necessity; nor is it extortionate. If the validity of the deed were questioned on those grounds, it would be a matter between the parties. But in this case the payment of the bulk of the consideration money depends upon the success of the then contemplated suit. That is merely a gamble in litigation, and contrary to public policy, and the Courts were right in holding the agreement void on those grounds. The question of its validity need not be raised only by the parties to it. The respondents, who are not parties to it, could question its validity: *Tara Soonduree Chowdhranee* v. *The Court of Wards on behalf of Shama Soonduree*; [1] *Ram Coomar Condoo* v. *Chunder Canto Mookerjee* [2] was a sequel to this case.

Though the English Statute Law and the Common Law are not introduced into India, there is something very similar to that in India, which will upset an agreement of this kind on the ground of public policy, and also on the ground of its being a gamble in litigation: *Lal Achal Ram* v. *Raja Kazim Husain Khan*.[3]

Lord *Robertson*:—Can you show me any form of agreement of this class, which would not be a gamble in litigation?

Sir *Robert Finlay*:—The agreement is against public policy and is legally immoral; and though the law of maintenance and

1. (1871) 20 W. R 446. 2. (1876) L. R. 4. I A. 23. I. L. R. 2 C. 233.
3. (1905) L. R. 32, I. A. 113 at p. 121. I. L. R. 27 A 271.

champerty is not binding in India, it should be set aside on the ground of public policy.

Lord *Robertson*:—Society in India makes it inexpedient to apply the law of champerty there.

Reference was also made to Stephen's Commentaries (5th Ed.) Vol. 4, Bk. VI, Ch. 9 XIII. p. 316, 317; Corpus Juris Civilis, Bk. 48, title 10, para 20, (1865) 5th ed). Lipsial ; Le Droit Civil Explique, (15th Ed. 1856) by M. Troplong. p. 482; Corpus Juris Civilis, (1865) edited by D. Albertus et. D. Mauritius Fratres Krisgelu, Vol. I. Bk. 44, title 6, and Vol. II. Bk. 4, title 35, and Bk. 8, titles 36 and 37: Dictionaire Usuel De Droit by Max Legrand—Restraint litigieux; and French Code, Vol. 2. Arts: 1699 and 1700.

The 1st appellant (plaintiff) claims possession and mesne profits on the ground of the alleged custom and assignment. The Subordinate Judge was wrong in giving the 2nd and 3rd appellants the relief, which he did. Neither of them has claimed any relief in the plaint, which is not amended. No amendment, which is inconsistent with the original character of the suit, could now be made—Civil Procedure Code (Act XIV of 1882) S. 53. Relief given by the Subordinate Judge could not come under a prayer of general relief in the plaint. Such a prayer must always be limited by two things—the facts which are alleged and the relief which is expressly asked:—*Cargill* v. *Bower*. [1] Any relief which might have negatived another suit under S. 13 of the Civil Procedure Code ought to be included in the general prayer, but not a relief of this kind.

Lord *Robertson*:—It breaks up the alliance, which is the theory of the plaint.

Sir *Robert Finlay*:—Yes, my Lord, one claim is absolutely repugnant to the other. No amendment of the plaint was in fact made.

The evidence shows that debts were incurred for necessaries. Money was borrowed over and over again to pay previous debts. Money borrowed to pay the costs of litigation was reasonable. Again, money borrowed to meet the marriage expenses, which were not extravagant, was a necessary. It is not incumbent upon

1. (1878) L. R. 10. Ch. D. 502, at p. 508

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the persons advancing money, as mortgagees or otherwise, to tax the bill and tell the borrowers, the ladies in this case, that a certain less amount of money would be sufficient instead of the sum contemplated to be spent. A Hindu widow is under an obligation to discharge her husband's debts, and she could either mortgage or alienate property for that purpose. A female heir is bound to maintain and perform the marriages and other ceremonies of those who are a burden on the estate, and she may mortgage or sell the property to procure the necessary funds—see Mayne on Hindu Law and Usage, 7th Ed; S. 633, 634, 635 and 346. Etraj Koer was the manager, and, as such, she gave the bonds which were ratified by Jileb Koer and Aprup Koer by their joining Etraj Koer in the later documents, which recite the earlier bonds. Looking at the evidence, there is no case whatever of misconduct with the management of the three ladies or on the part of the respondents. The High Court was right in holding that the alienations here were for necessaries, and, therefore, binding on the appellants, the next heirs.

If the agreements of sale are set aside, the respondents are entitled to be put in their original position. The figure decreed by the Subordinate Judge is quite out of the question. He allows no interest, which should be allowed.

Cohen, K.C., in reply, contended that neither the French nor the Roman Law of Champerty would apply to India. Even the English Law on the subject was not in force in India. Reference was made to *Hutley* v. *Hutley*;[1] *Tarachand* v. *Suklal*,[2] and the Laws of England, Vol. I., p. 52, and the cases there cited. There was not a single case either English or Indian, where the defendant was a third party and a stranger to the champertous agreement, and such agreement was set aside. Only one case, *Tara Soonduree Chowdhrani* v. *The Court of Wards on behalf of Shama Soonduree*[3] was cited, but in that case the defendant derived her title through a party to the champertous agreement. Reference was also made to the Indian Contract Act (IX of 1872) S. 30; Civil Procedure Code (XIV of 1882) S. 13; and Principles of German Civil Law, by E. J. Schuster (Ed. 1907), Headings, Effects of Absence of Authority, Ratification, and

1. (1873) L. R. 8. Q. B. Case 112 at p. 115. 2. (1888) I. L. R. 12 B. 559.
3. (1871) 20. W. R. 446.

Ratification of Agreements, pp. 119 and 120; and *Raj Lukhee Dabea* v. *Gokool Chunder Choudhury.*[1] Etraj Koer had no authority to act for, and she was not acting as the agent of, Jileb Koer, who could not, therefore, ratify Etraj Koer's act. If the appellants get a decree for mesne profits as well as for possession, the respondents may have interest at the usual rate, *i.e*, 6 per cent. per annum.

Their Lordships' Judgment was delivered by

Sir *Arthur Wilson*:—These consolidated appeals relate to three villages Chiyanki, Ganka and Lalgara, and the substantial conflict is between the first appellant and the first respondent.

The villages with others were formerly the property of Ram Saran Singh, who on his death was succeeded by his infant son Narayan. Narayan died, while still an infant and unmarried, on the 7th August 1879, and left surviving him his grandmother Jileb Koer, an aunt, Aprup Koer, widow of Ram Saran's brother, and a step-mother, Etraj Koer, widow of Ram Saran. Of these the grandmother was heir to the boy's property, with the limited interest of a Hindu female inheriting from a male. The three ladies appear to have lived together down to the death of the grandmother, which took place on the 22nd November 1894.

On the death of the grandmother, the inheritance again opened, and the 2nd and 3rd defendants, Bhan Pertab Singh and Kirpa Narayan Singh, were then the nearest male heirs of the deceased boy. Those two persons on the 29th November 1895 purported to sell the three villages in question to Raja Bhagwat Dayal Singh, the first appellant, and that is the title under which he claims.

The first respondent, on the other hand, as the case is now put on his behalf, claims under two sale deeds executed, as it is now said, by or on behalf of the grandmother Jileb Koer, the sales being, it is contended, justified by necessity so as to pass the whole inheritance. The first of these deeds bore date the 19th January 1887. It purported to be a conveyance by way of sale, by the three ladies, who have been mentioned, of the two villages Chiyanki and Ganka to the first respondent. The second deed was dated the 15th May 1891. It purported to be executed by the

1. (1869) 13 Moore I. A. 209 at p. 224.

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same three ladies in favour of one Hodges, and to convey to him, by way of sale, the village Lalgara. Hodges afterwards conveyed to the first respondent.

The present suit was brought on the 29th August 1898 in the Court of the Subordinate Judge at Ranchi. The plaintiffs were the first appellant and the two persons from whom he purchased. The sole defendent in one suit and the substantial defendant in the other was the first respondent. The first suit related to the village Lalgara, and the second suit to the villages Chiyanki and Ganka. The claim in each case was for possession and mesne profits. The first question raised in the case and argued on the appeals was whether or not the sale by the second and third appellants to the first appellant was void in law, so as to pass no title, on the ground that it was champertous or contrary to public policy.

For the first respondent it was boldly argued that, although the English law as to maintenance and champerty is not, as such, applicable to India, yet, on other grounds, what is substantially the same law is there in force. Their Lordships are of opinion that that proposition cannot be supported. In three cases before this Board—*Ram Koomar Coondoo* v. *Chander Canto Mookerjee*;[1] *Kunwar Ram Lal* v. *Nilkanth*;[2] *Lal Achal Ram* v. *Raja Kazim Husain Khan*[3]—a contrary doctrine has been laid down. In the last of those cases full effect was given, under circumstances closely analogous to those of the present case, to an agreement which would certainly have been void if champerty avoided transactions in India.

It was further argued that the transaction in question was contrary to public policy, and void on that ground, by reason of the provision as to payment of the purchase money by the 1st appellant to the 2nd and 3rd. The purchase money was fixed at Rs. 52, 600 of which Rs. 600 was to be down, and the balance when the property should be recovered. Their Lordships are unable to agree to this argument. In their opinion the condition so introduced does not carry the case any further than does the champertous character of the transaction generally.

It was further said, and this was relied upon in the Courts in India, that the transaction was an unfair and unconscionable

1. (1876) 4 I. A. 23; I. L. R. 2 C. 233. 2. (1893) 20 I. A. 112.
3. (1905) 32 I. A. 113; I. L. R. 27 A. 271.

bargain for an inadequate price. But that is a question between the assignors and the assignee. It is unnecessary to consider what the decision ought to have been if this had been a litigation between the assignors and the assignee in which the former sought to repudiate the assignment. In the present case the assignors do nothing of the kind. They maintain the transaction and ask that effect be given to it, and for that purpose they join as plaintiffs in the present actions. Their Lordships are, therefore, of opinion that the attack upon the title of the first appellant upon such grounds as those indicated must fail.

The second question that has to be considered is whether the second respondent has shown a good title in himself by purchase from Jileb Koer, the grandmother, under the two sale deeds mentioned, and under such circumstances as to make that title effectual against reversionary heirs.

The Subordinate Judge who tried the cases, held that the conveyances were not good, but he allowed, in favour of the first respondent, certain sums which he considered to have been advanced for purposes of legal necessity, and whilst giving a decree to the appellants and plaintiffs for possession of the property, he made that decree conditional upon the payment to the respondent, of the sums held to have been advanced for legitimate necessities. On the argument of these appeals, Mr. *Cohen* for the appellants, accepted the propriety of this mode of dealing with the case, and assented to the allowance so made by the Subordinate Judge.

The High Court, on appeal, differed from the first Court, and held that necessity for the sales in question was established.

Before dealing further with this, it must be noticed that the case now contended for is not the case raised on the pleadings and relied upon at the trial. The respondent in his written-statement alleged a title, derived, not from Jileb Koer, but from Etraj Koer. He said, in paragraph 21, that " Etraj Koer was heir to Narayan Saran Singh, and that she acquired a right by adverse possession ;" in paragraph 23, that, "it is not true, as the plaintiffs allege, that on the death of Narayan Saran Singh, Jileb Koer succeeded as heir and was in possession up to her death ; the fact

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is * * Etraj Koer alone was in such possession until her death ;" and in paragraph 25 that "Jileb Koer and Aprup Koer never took the estate of Narayan Saran Singh as heir, and the fact of their joining in the documents as persons executing the deeds of sale and the prior deed was a matter of form of evidence of members dependant for maintenance on Etraj Koer, and was merely a surplusage;" and it was added in paragraph 26 that "even if Jileb Koer were to have taken the estate * * * by inheritance, she would take an absolute estate * * * under the provisions of the Mitakshara Law, and so also if she was made a co-sharer by Etraj Koer in Etraj Koer's right." In his evidence given at the trial the respondent endeavoured to maintain the case that his title was derived from Etraj Koer and was good on that account.

One who claims title under a conveyance from a woman, with the usual limited interest which a woman takes, and who seeks to enforce that title against reversioners, is always subject to the burden of proving not only the genuineness of his conveyance, but the full comprehension by the limited owner of the nature of the alienation she was making, and also that that alienation was justified by necessity, or at least that the alienee did all that was reasonable to satisfy himself of the existence of such necessity. And this burden lies the more heavily on one who comes into Court with the case that he did not take it from a limited owner, but from one whose title he alleges to have been adverse to that owner.

These considerations apply with special force to the present case. The earlier transactions of the 1st respondent were with Etraj Koer, and there is no satistactory evidence to show that Jileb Koer, the real owner, took part in them, or authorised them in any way.

It was argued, however, that, if Jileb Koer was not shown to have authorized the earlier transactions, she had satisfied them by being a party to the latter documents and particularly the two sale deeds. Ratification, in the proper sense of the term, as used with reference to the law of agency, is applicable only to acts done on behalf of the ratifier. And this rule is recognized in S. 196 of the Indian Contract Act. Looking to the substance of the matter it would be a serious extension of the law as hitherto upheld to hold that a woman with a limited interest could, by

acts *ex post facto*, charge upon the estate which she represents obligations not originally binding upon it.

With regard to the first of the sale deeds now in question, when the details which make up the consideration come to be examined, it appears that they include a sum of Rs. 1,500 which the Subordinate Judge credited to the first respondent, in the manner already explained. Apart from this sum the great bulk of the consideration for this sale deed consists of debts originally incurred by Etraj Koer with accretions of interest and compound interest. Their Lordships are of opinion that this deed was correctly estimated by the Subordinate Judge.

The case as to the second sale deed is not quite so simple. With regard to it the Subordinate Judge gave credit for the first respondent for considerable sums as having been advanced for real necessities. As to the rest of the consideration for that deed, he held that necessity had not been established. In coming to this conclusion, he took into account not only the more general considerations already referred to, but also certain circumstances peculiar to the case—that the lady who alone had any power to convey was old, and had no independent advice to guide her, and that the first respondent was in a position to exercise considerable influence over her affairs. Their Lordships think the Subordinate Judge was justified in taking all these matters into his consideration, and they see no sufficient ground for rejecting his conclusion.

There remains one other point for consideration. The plaintiffs claimed not only possession but mesne profits. The Subordinate Judge rejected the latter claim. Their Lordships are of opinion that as the deeds of sale are not good as such, the claim for mesne profits is well founded. In argument it was conceded that on the other side of the account, interest at 6 per cent per annum should be allowed on the sums credited to the first respondent. The amounts thus to be allowed on the one side and on the other, can be adjusted in execution proceedings.

Their Lordships will humbly advise His Majesty that the appeals should be allowed; that the decrees of the High Court should be discharged with costs to be paid as regards the first decree by the present respondents other than Sowton, and as regards the second decree by the 1st respondent; that the decrees

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of the Court of the Subordinate Judge should be discharged and, instead thereof, it should be ordered that upon the 1st appellant paying to the first respondent the sums found in favour of the latter by the Subordinate Judge with interest at 6 per cent per annum, the 1st appellant do recover possession of the property in suit together with mesne profits to be ascertained in execution proceedings and costs to be paid by the first party defendants in the first suit and by the sole defendant in the second suit.

The respondents other than Sowton will pay the costs of these appeals.

Appeal allowed.

Appellants' Solicitors:—Messrs. *Withall* and *Withall*.

Solicitors for respondents other than Sowton:—Messrs. *L. L. Wilson* & *Co.*

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[APPEAL FROM THE CALCUTTA HIGH COURT].

Present:—Lord Robertson, Lord Collins and Sir Arthur Wilson.

Baijnath Gaenka and another .. Appellants.*

v.

Ramdhari Chowdry and others .. Respondents.

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Mahomedan Law—Pre-emption—Claim to pre-empt—Delay—Question of fact—Privy Council Practice—Estoppel by conduct—Withdrawal by pre-emptors of mortgage money deposited by purchaser in their capacity as mortgagees.

The right of pre-emption must be exercised and the claims necessary to give effect to it must be made with the utmost promptitude, and any unreasonable or unnecessary delay is to be construed as an election not to pre-empt.

The question whether there has been such delay is a question to be determined upon the facts of each particular case.

The pre-emptors in the case obtained all the necessary information about the sale on the 5th of a particular month. On the 6th they applied to the proper officer for a police guard to protect the messengers taking the money to the purchaser. They obtained the guard on the 7th, and the messengers made the claim of pre-emption at the house of the purchaser on the same day.

Held:—That there was no delay on the part of the pre-emptors so as to disentitle them to pre-empt, and that the grounds on which the High Court differed from the trial Judge on this question of fact were insufficient for a reversal of the judgment of the first Court.

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* 24th January 1908.

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Held also :—That the withdrawal by the pre-emptors of the mortgage money deposited in Court by the purchaser, in their capacity as assignees of a mortgage on the property sold was no recognition of the purchaser's title and was quite consistent with their claim to pre-empt

Two consolidated appeals from two decrees of the Calcutta High Court (both dated January 20, 1904) reversing two decrees of the Court of the Subordinate Judge of Monghyr (both dated March 31, 1900) and dismissing the appellants' suits.

The main question raised on the appeals was whether the appellants were entitled to pre-empt a 4 anna share in certain properties sold on December 17, 1897, by Anupbati Koeri (respondent No. 2) to Nerbhoy Chowdhry, original defendant No. 1, who died *pendente lite* and was represented by respondent No. 1 and others.

The two suits were analogous and had been tried together at the instance of the parties. It was admitted that both suits would be governed by one judgment.

One Maharaj Singh was the original owner of Taluka Rasulpur Bhatowni consisting of two separate puttis. On March 3, 1878, he divided that Taluka equally between his two sons, Jugal Pershad Singh and Kamla Pershad Singh, who became the owners in possession, each of an 8 anna share.

In or about the year 1884, Jugal Pershad mortgaged his 8 anna share to Jowhuri Lal and Mangni Ram (original plaintiffs and appellants, deceased). On his death his widow Rajbati acquired his estate by right of inheritance. Suits for sale of the mortgaged property were brought against her. On April 2, 1889, decrees were made in favour of the mortgagees. In execution of these decrees the 8 anna share was on January 1, 1891, purchased by the appellants who thus became owners, each of a 4 anna share and obtained possession thereof.

Kamla Pershad died, leaving him surviving two widows, Sundarbati and Anupbati (respondent No. 2) who acquired their husband's 8 anna share in the Taluka. In order to pay their husband's debts they borrowed Rs. 63,000 from the Ulas Babus, and executed a Sudbharna in their favour on January 10th, 1883, mortgaging their 8 anna share The usufructuary mortgagees remained in possession of that share. Sundarbati, in order to liquidate the mortgage debt, sold her 4 anna share in the

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taluka to the appellants, a 2 anna share to each, under two seperate *kobalas* dated July 9th, 1897, receiving for the two sales an aggregate consideration of Rs. 40,000. The appellants deposited in Court the entire Sudbharna debt, Rs. 63,000, and redeemed the mortgage and obtained possession of the entire 8 anna share, which belonged to the two widows with the exception of certain small share in certain mouzah.

On December 17, 1897, Anupbati sold her 4 anna share (subject to certain minor reservations) to Nirbhoy Chowdhry.

On June 30th, 1898, the appellants instituted the present suits in the Court of the Subordinate Judge of Monghyr. The plaints alleged that the appellants, who were shareholders in the Taluka, were willing to purchase Aunpbati's share. But she sold the same as already stated, without their knowledge and consent. The appellant, Jowhuri Lal, in the first suit, came to know of the sale for the first time on December 20, 1897, and he at once performed the ceremony of *talab-i-mowa-shibat* (immediate demand) on that day. The appellant, Mangni Ram, in the second suit, returned to Monghyr from Benares on January 5, 1898, and learnt for the first time about the sale in question on that day and at once performed the ceremony of *talab-i-mowa-sihbat* on the same date. Both appellants then caused the ceremony of *talab-i-istishad* to be performed by their respective agents at the residence of the purchaser, respondent Nirbhoy Chowdhry, at Maheshpur, on January 7, 1898, and on the property sold, and at the residence of the vendor Anupbati at Bhat Khund on the 11th and 12th of that month. The appellants pleaded that Rs. 44,856, the amount entered in the sale deed as the consideration, was not actually paid. The relief sought was a decree for pre-emption on payment of the true consideration as determined by the Court.

The defendant, Nirbhoy Chowdhry, in his written statement, filed on September 1st, 1898, denied that December 20th, 1897, and January 5, 1898, were respectively the earliest dates on which the appellants had obtained information of the sale. He pleaded *inter alia* that the appellants had previously known and acquiesced in the negotiations and agreement and execution of the sale deed; that the formalities required by the Mahomedan Law were not carried out at the proper time and place; that the appellants induced Anupbatis' co-widow to sell to them her 4 anna

share by promising to pay to her any excess price which Anupbati might obtain; that they refused to purchase Anupbati's share for a higher price than Rs. 36,000 and that they were never ready and desirous to purchase the same at a proper price. He also denied that the consideration set out in the deed of sale was not paid in fact. Baijnath Gaenka v. Ramdhari Chowdry.

The respondent Anupbati also filed her written statement in both suits to a similar effect. She further alleged that the appellants while refusing to raise their price said "that if any other person was willing to pay a higher price this defendant should sell to him" and that on account of this refusal she sold to Nirbhoy Chowdhry, for Rs. 44,850, the proper price, the appellants all along declining to buy and endeavouring to prevent a purchase by Nirbhoy Chowdhry or any other person.

Mangni Ram, the defendant third party in the first suit, was the plaintiff in the 2nd suit, and the plaintiff in the 1st suit was the defendant third party in the 2nd suit.

After the institution of the suits the appellants on Sept. 13, 1898, withdrew from Court the amount of the Sudbharna debt deposited by Nirbhoy Chowdhry, of July 2, 1898, on account of the share of his vendor Anupbati and gave up possession of the property in suit. The plaints were accordingly amended at the instance of the appellants.

Of the five issues fixed by the Subordinate Judge it is necessary to mention here only the following:—

3. When was the plaintiff aware of the purchase by defendant 1st party?

4. Whether the ceremonies *talab-i-mowa-shibat* or *talab-i-istishad* was duly and legally performed and were *bona fide*?

5. Whether plaintiff had notice of, and gave consent to, the defendant 2nd party's selling the property in suit, if she got a higher price than Rs. 36,000?

6. Whether plaintiff's right of pre-emption has been lost by reason of his gross negligence and is he estopped from claiming the same?

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7. For what price was the disputed property sold to the defendant first party, and what consideration did he actually pay for the property?

On March 31, 1900, the Subordinate Judge delivered his judgment. He found that the appellant Jowhuri Lall was first informed of the sale in dispute on December 20, 1897, and that the appellant Mangni Ram, on January, 5, 1898, and that both the appellants, immediately on receipt of the information, declared their intention to claim pre-emption and thus duly carried out the formality of the *talab-i-mowa-shibat*. He also decided that the other formality of the *talab-i-istishad* had also been duly performed and without unreasonable delay. He also held that the actual consideration for the sale was Rs. 37,000 and that the appellants were not estopped by their conduct from asserting their right to pre-emption. In the result he made a decree in favour of each of the appellants for pre-emption of one-half of the property sold on payment of one half of the sum of Rs. 37,000.

Against the decrees of the Subordinate Judge, Nirbhoy Chowdhry appealed to the High Court of Judicature at Fort William in Bengal. The High Court delivered its judgment on January 20, 1904. It decided that the *talab-i-mowa-shibat* and the *talab-i-istishad* were performed, as alleged, but was of opinion that the appellants were precluded from claiming pre-emption, because they had not made *talab-i-istishad* with the least practicable delay. The High Court was also of opinion that the full amount of consideration as stated in the deed of sale had been paid by the vendee to the vendor and that the appellants had waived their rights of pre-emption. In accordance with the above findings the High Court passed decrees reversing the decrees of the Subordinate Judge and dismissing the suits with costs.

The appellants, thereupon, preferred the present appeals, which were consolidated, to His Majesty in Council.

De Gruyther and *G. A. H. Branson*, for appellants: The question for decision relates to Mahomedan usage or institution and the law applicable to the case is the Mahomedan Law on grounds of justice, equity and good conscience—the Bengal, United Provinces and Assam Civil Courts Act (XII of 1887, B. C.) S. 37. To assert a valid claim to pre-emption two formalities are requisite, known as the *talab-i-mowa-shibat* and

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the *talab-i-istishad.* The former consists in declaring an intention to pre-empt immediately on hearing of the sale ; the latter consists in a formal declaration made with the least practicable delay to the same effect, before witnesses, in the presence of either the vendor or vendee, or on the premises sold. For the explanations and definitions of these two terms reference was made to Baillie's Digest of Mahomedan Law, Vol. I (2nd Ed. 1875) pp. 487 and 489; Hamilton's Hedaya (2nd Ed. 1870) pp. 550 and 551 ; *Jarfan Khan* v. *Jabbar Meah* ; [1] Ameer Ali's Mahomedan Law, Vol. I. (3rd Ed. 1904) Ch. 25 S. 3, and *Syad Amjad Hossein* v. *Kharag Sen Sahu*[2]. The law seems to rest upon the *Koran* and then upon tradition, and lastly upon the judicial decision and interpretation of the *Koran* and tradition. Both Courts in India have concurred in holding that *talab-i-mowa-shibat* was duly and properly performed by the appellants immediately on hearing of the sale; they have also concurrently found that the *talab-i-istishad*, was duly performed. But the Subordinate Judge held that there was no unnecessary delay in its performance, while the High Court held that there was delay. It is submitted that the Subordinate Judge was right and that the High Court erred. *Talab-i-istishad* must be performed after the first demand without any unnecessary delay, which means that it must be performed in a reasonable time. The pre-emptor is entitled to be satisfied as to the truth of the sale. There was no delay after the facts were obtained. The official calendar shows that the delay was due to holidays. The appellants are not responsible for that. The High Court was wrong in holding that the appellants waived their right to pre-empt, because when they could not come to terms, they said : " You may sell to any one you like." The true consideration for the sale was Rs. 37,000 as found by the Subordinate Judge.

Jardine, *K. C.*, and *Cowell* for respondents :—The right of pre-emption owes its origin to motives of expediency and a desire to prevent the introduction of a stranger among co-sharers and neighbours likely to cause inconvenience or vexation. It is a personal right, and not a right incidental to ownership of property ; *Amir Ali's* Mahomedan Law, Vol. I, (3rd Ed. 1904) 596. See also *Wilson's* Digest of Anglo-Mahomedan Law (2nd Ed. 1903) Ch. 12. Art. 375 and 379 ; and *Baillee's*

1. (1884) I. L. R. 10 C. 383. 2. (1870) 4 B. L. R. 208 A. O. J

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Digest of Mahommedan Law, Bk. 7, Chs. I and 3. It is not necessary that the pre-emptor should tender the price at the time of making his formal claim. Here the delay is partly put down to getting escort of police for the safety of the tender money. *Talab-i-istishad* should be made with the least practicable delay: *Mussammat Jumulum* v. *Luteef Hossein*.[1] The High Court is right in coming to the conclusion that there was unnecessary delay. There is ample evidence to show that the appellants were perfectly aware of the negotiations, which brought about the sale in question. The ceremony of *talab-i-istishad* must be done "instantly", and it is not enough, as the Subordinate Judge says, that there should be no gross negligence in doing it. If the pre-emptor takes any benefit from the purchaser or recognises his right under the purchase in any way, he (the pre-emptor) waives his right of pre-emption. The purchaser paid money into Court on July 2, 1898, to pay off the mortgage on the property. The appellant-pre-emptors, who were the mortgagees took that money out of court on September 13, 1898, and gave possession to the purchaser. The appellants thus recognised the purchase and waived their right to pre-empt. The High Court says the point was not raised in the written statement, which, was filed on September 1. The money was taken out on September 13. It was, therefore, not possible to raise this plea in the written statement. But it was raised at the earliest opportunity, *viz.*, in the memorandum of appeal. The appellants having once taken the money out of Court, could not question the purchase. Reference was made to the Transfer of Property Act (IV of 1882), Ss. 63 and 84; and *Habib-un-Nissa* v. *Barkat Ali*.[2]

De Gruyther replied.

Their Lordships' Judgment was delivered by

Sir *Arthur Wilson*:—These two consolidated appeals arise out of two suits, one brought by Mangni Ram, the other by Jowhuri Lal, to enforce a right of pre-emption in respect of a share in certain properties comprised in Taluka Rasalpur Bhatowni.

By conveyances, dated 28th January 1891 and 9th July 1897, Mangni and Jowhuri had become the owners in equal shares of 12 annas of the property. The remaining 4 annas belonged to the respondent, Anupbati Koeri, who, on the 17th December 1897,

1. (1871) 16 W. R. 13 at p. 14 (F. B.) 2. (1886) I. L. R. 8 A. 275.

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sold those four annas to Nirbhoy Chowdhry, and that is the sale against which the right of pre-emption is claimed. It has been found that Jowhuri first heard of the sale on 20th December 1897, and that thereupon he at once made the immediate claim to pre-empt which the law requires. Mangni first heard of the sale on 5th January 1898 and at once made his immediate claim. No question, therefore, arises with regard to the first claim by each of the two men. The principal controversy between the parties, and the point on which the Courts below have differed, is an alleged delay in making the second claim, the claim with witnesses, which also is required by law.

Jowhuri, on hearing of the sale, which he did at Monghyr, at once sent to his agent at or near Gogri to procure from the Registry office a copy of the sale deed. The Agent obtained that copy and sent it to Jowhuri, who actually received it on the 4th January. The High Court differing from the Subordinate Judge, has found delay at two points of these proceedings. It was held, first, that the copy from the Registry office was not obtained and sent off as soon as it might have been. But an examination of the official Calendar shows clearly that the learned Judges were led to this conclusion by a misapprehension as to the time during which the Registry office was closed for the Christmas vacation. The High Court held, secondly, that Jowhuri was guilty of wilful delay by his refusal to receive the packet containing the copy of the sale deed from the Post Office peon. This conclusion is based upon the evidence of the peon himself, which the learned judges believed. But the Judge who had this witness before him disbelieved the story. That story is admittedly inconsistent with the rules of the Post Office ; and it finds no support from the witness' own endorsement made at the time. Their Lordships think that the Subordinate Judge was right in rejecting the story, and therefore the second allegation of delay fails.

The more serious case of delay is said to have occurred subsequently, and with respect to it, the position of Mangni and Jowhuri is identical. On the 5th January they knew everything which it was essential to know. On that day they took the advice of a local barrister, and in accordance with his advice they on the next day, 6th January, applied to the proper officer for a Police guard to protect the messengers and the money which it was proposed

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those messengers should tender. This guard they obtained on the 7th, and the messengers started. On that day, those messengers made their claim (and, as has been found, with due formalities) at the house of Nirbhoy, the purchaser. On subsequent days the claim was renewed at the house of the vendor, and upon the land. The question that arises is, whether the interval that elapsed between the 5th January and the 7th January is a fatal delay. The Subordinate Judge held that it was not; the High Court held that it was.

There is no question of law in the case. It is clear that the right of pre-emption must be exercised, and the claims necessary to give effect to it must be made with the utmost promptitude, and that any unreasonable or unnecessary delay is to be construed as an election not to pre-empt. And whether there has been such delay is a question to be determined upon the facts of each particular case. It is enough for their Lordships to say that, in their opinion, the grounds stated by the learned judges of the High Court for overruling the decision of the first Court, on a pure queston of fact, were insufficient.

Another point argued on behalf of the respondents arises in this way:—The two plaintiffs, Mangni and Jowhuri, had obtained a transfer of a Zurpeshgi mortgage binding the four annas share sold by Anupbati to Nirbhoy. After that sale Nirbhoy paid the mortgage money into Court in accordance with the provisions of the Transfer of Property Act, for the purpose of redeeming the mortgage; and after some hesitation, the two plaintiffs took out the money. It was contended that by so doing they had recognised the title of Nirbhoy under his purchase and could not claim pre-emption.

Their Lordships cannot agree with this contention. Until a decree for pre-emption was made Nirbhoy owned the land as purchaser, and had a right to redeem. The taking out of the money by the plaintiffs, as mortgagees, was no recognition of anything more than this, and was quite consistent with the claim to pre-empt.

There remains only one point for consideration as to which again the Courts in India have differed; and that is as to the amount actually paid by Nirbhoy to Anupbati, the difference

being Rs. 7,850. As to this point, their Lordships do not find a clear and positive finding by the Subordinate Judge that the full sum named in the deed of sale was not in fact paid ; and they are not prepared to dissent upon this point from the judgment of the High Court.

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Their Lordships will humbly advise His Majesty that these appeals should be allowed ; the decrees of the High Court should be discharged with costs; that the decrees of the Subordinate Judge should be varied by directing the price of pre-emption to be calculated on the sum of Rs. 44,850 (the price named in the deed of sale from Anupbati to Nirbhoy) and the amounts to be deposited in the Court of the Subordinate Judge within such times as the High Court or the Subordinate Judge may determine ; that subject to these variations and the payments to the appellants of additional costs (if any) the decrees of the Subordinate Judge should be restored ; and that the cases should be remitted to the High Court in order that the necessary steps may be taken for the disposal thereof on the above footing.

The respondents who have resisted the appeals will pay the costs thereof.

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Baijnath Gaenka v. Ramdhari Chowdhury.

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The respondents who have resisted the appeals will pay the costs thereof.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE CALCUTTA HIGH COURT.]

Present:—Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble and Sir Arthur Wilson.

Chhattrapat Sing Dugar .. Appellant.*

v.

Maharaj Bahadur Singh and another .. Respondents.

Chhattrapat Singh Dugar v. Maharaj Bahadur Singh.

Bengal Land Registration Act (VII of 1876, B.C.)—Action of Revenue authorities under it—Jurisdiction of Civil Courts.

Civil Courts have no jurisdiction to direct the action of the Revenue authorities under the Bengal Land Registration Act.

Appeal from a decree of the Calcutta High Court (February 1, 1904) reversing a decree of the Court of the Subordinate Judge of Dinajpur (December 22, 1899) and dismissing the appellant's suit.

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* 4th February 1908.

Chhattrapat Singh Dugar v. Maharaj Bahadur Singh.

On December 17, 1866, a lady called Mahatap Kumari Bibi, the paternal grandmother of the appellant and the first respondent, executed a will. After making various devises and bequests of other portions of her property, she devised the property in suit, an "8 anna share of lot Sankarpur Mahal, No. 76 on the rent roll of the Collectorate" to trustees in trust to "spend the amount of profit thereof annually at Sidhyachalji, and for the purpose of entertaining our castemen, for reparation of temples and for other good acts." By that will she appointed her two sons, Rai Luchmipat Singh Bahadur and Rai Dhanpat Singh Bahadur, the fathers of the appellant and of the first respondent respectively, trustees—along with five others. Mahatap Kumari Bibi died in August 1874. In the Collector's Registers, on the death of Mahatap Kumari Bibi, the names of both her sons, Lachmipat and Dhanpat Singh, were entered in her place in regard to the said property with the following remark:—

"These two persons are interested (in the properties) as trustees in an 8 anna share under a will of their mother to perform religious acts."

On May 24, 1886, Lachmipat Singh died. Thereafter his son Chhattrapat Singh Dugar, the appellant, applied to have his name entered in the Revenue Registers in place of his deceased father. That application was granted by the Deputy Collector, but was rejected on appeal by the Collector of Dinajpur.

On May 23, 1892 the appellant instituted a suit (No. 445 of 1892) against his uncle Dhanpat Singh in the Court of the Subordinate Judge of Murshidabad for an account of administration of his grandmother's property and for a declaration, in regard to the rights of the parties under her will. That suit ended in a compromise effected on March 24, 1893, which provided *inter alia* as follows:—

2 "According to the will of the late Mahtap Kumari Bibi, the paternal grandmother of the plaintiff and mother of the defendant, an 8 anna share of lot No. 76 Sankarpur has been dedicated to religious purposes; and in respect of the same the names of both of us, *i.e.*, of the plaintiff and defendant, shall be and shall continue to remain registered as trustees. The said property shall remain in possession of the defendant, and the defendant shall have the charge of

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collecting rents for the same, institute suits, and do every thing in respect thereof; and I, the plaintiff Chhattrapat Singh, will get from the defendant the total amount Rs. 1,200 (twelve hundred) a year out of the profits thereof; and with the same I shall continue to defray the expenses on account of the temple of the god Bimalnathji, and of the temple of Dadaji, of the *sadabrata* (charitable establishment for entertainment of mendicants) at Baluchar and other purposes. After deduction of the said amount of Rs. 1,200, the remaining amount of profits shall be used by the defendant in defraying expenses for *dharamasala* and *sadabratas*, and at Sidhyachalji, Bhagulpur, Calcutta, Azimganj, &c. Besides the lot No. 76 Sankarpur, the name of the defendant will remain registered as trustee in respect of other properties, and they shall remain under the supervision of the defendant."

3. " In the absence of the plaintiff, his heirs, and in the absence of the defendant, his heirs, who will remain in commensality with him, will become trustees like them respectively. On getting the amounts of profits in the manner aforesaid they and their heirs in succession shall continue to maintain the aforesaid religious acts regularly, as aforesaid in due order. If any of the parties do not spend the money, that will have been obtained for the prescribed purposes, and appropriate the said money, he will become personally liable for the said money; and the other party on performing the said acts will realize the same; and except that, none of the two parties shall be able to advance any claim for account against the other in future."

On March 24, 1893, a decree was made in accordance with this compromise.

In April 1896 the appellant filed a petition for registration of his name jointly with the name of Dhanpat Singh in the registration department of the Collectorate of Dinajpur under the provisions of the Land Registration Act, VII of 1876, (B. C.,) but on June 26, 1897, on objections taken by the first respondent, who had succeeded his father Dhanpat Singh as his heir, that petition was rejected, the Deputy Collector holding that the phrase "registration of name" in the above-mentioned compromise meant some registration "other than the registration under Act VII of 1876." On appeal the Collector confirmed that order on July 21, 1897.

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On July 1, 1898, the appellant instituted a suit against the respondents in the Court of the Subordinate Judge of Dinajpur to recover from them the sum of Rs. 4,100 alleged to be due as arrears of the amount payable under the compromise and decree in suit No. 445 of 1892. A decree was made in favour of the appellant.

On July 7, 1898, the appellant instituted the present suit in the Court of the Subordinate Judge of Dinajpur against the respondents, representing the estate of Dhanpat Singh. The plaint, after reciting the facts above mentioned, alleged that the five persons appointed as trustees by Mahatap Kumari Bibi with her two sons having relinquished their office as executors and trustees, Dhanpat Singh was managing the affairs of the estate as a trustee; that according to the will dated December 17, 1866, and to the decision in the terms of the compromise in Suit No 445 of 1892, the appellant was, entitled to, and in possession of the Mahal Sankarpur, as a trustee thereof jointly with Dhanpat Singh in his lifetime, and since his death, with his son the first respondent; that it was improper for the Deputy Collector to reject the appellant's petition for registration of the name of the appellant, and to hold that by the words "registration of name" contained in the compromise, the registration of name under Act VII of 1876, (B. C.,) was not understood, and that thereby the appellant's right and interest in the said trust property had been affected. The appellant prayed for the following reliefs:—

"That the Court be pleased to pass a decree, declaring the plaintiff's right and possession in the 8 annas share of the said *Mahal*, lot *Sankarpur*, as trustee thereof with the defendant after determining the same.

"That the Court may be pleased to hold the permission given for registration of name on the petition of the above mentioned *Solehnama*, made in the Court of the Subordinate Judge of Murshidabad, and in the decree passed in terms thereof, as [permission for] the registration of name according to the Registration Act VII of 1876 of the Bengal Council, and to pass a decree declaring the same."

The respondents in their written statement pleaded *inter alia* that Lachmipat Singh, father of the appellant, had virtually renounced his trusteeship, and that the property in suit ever since then and for upwards of 12 years before the suit, had been

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in the sole possession of the father of the first respondent; that the appellant never having had possession of the *mahal*, could not have a declaration of his possession and title to the same, nor could he have a declaration as to the registration of his name under the Land Registration Act, as contended, with reference to the terms of the compromise; that the respondents were not bound by the compromise; and that the father of the appellant having renounced his trusteeship in his life time, the appellant could not be held to be a trustee in his place. Of the twelve issues framed, it is necessary to mention here only the following:—

6th. With what object and intention was the word "hamjari" used in the petition of compromise and decree in Suit No. 445 of 1892, of the Subordinate Judge's Court at Murshidabad, and what is the meaning of that word in the same?

7th. Whether the plaintiff has any right to have his name registered in the Dinajpur Collectorate as a trustee for the 8 annas share of lot *Sankarpur* bearing *Towzi* No. 76?

8th. Whether the plaintiff is in possession of the property? If not, can his name be registered?

9th. To what relief, if any, will the plaintiff be entitled?

On December 22, 1899, the Subordinate Judge delivered his judgment. He decided nearly all the issues in favour of the appellant, and made a decree in his favour in terms following:—

"It is ordered that the suit be decreed with costs in the preence of both the parties; that the plaintiff's right to the disputed property as co-trustee jointly with the defendant be declared; that the plaintiff has right to get from the defendant Rs. 1,200 annually from the profits of the said property; and that it be declared that the plaintiff should have possession only in that right; that it be further determined that the clause 'the plaintiff's name will be registered as a trustee in respect thereof and will continue to remain so' in the *Solehnama* means that the plaintiff's name will be registered in respect of the *mahal* in dispute under the provisions of Act VII of 1876 of the Bengal Council."

Against that decree the respondent appealed to the High Court of Judicature at Calcutta. The High Court delivered its judgment on February 1, 1904, and decided that the Civil Court was not competent to direct the action of the Revenue authorities under

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the Land Registration Act, and that the appellant was not entitled in any way to bring the present suit. In the result, the High Court set aside the decree of the Subordinate Judge and dismissed the appellant's suit with costs in both the Courts. The High Court gave for its decision the following reasons :—

" The present suit is really to obtain an order from this Court which would bring about a reconsideration of the order passed by the Revenue authorities so as to obtain the registration of the name of Chhattrapat as a co-trustee with that of Dhanpat.

" We may first of all observe, and this is admitted by both the learned pleaders who have appeared in the present case, that even if we were inclined to hold in favour of the plaintiff, we are not competent to direct the action of the Revenue authorities under the Land Registration Act. The prayer in the suit is also for a declaratory order in respect of the plaintiff's right of possession in this property as trustee together with the defendant.

"The Subordinate Judge decreed the plaintiff's suit. He declared the plaintiff's right in the disputed properties as a trustee jointly with the defendant and also that the plaintiff had a right to get from the defendant Rs. 1,200, annually, from the profits of Sankarpur ; that the plaintiff should have possession of that property only as a co-trustee ; and he further found for the purposes of the *Solehnama* that the plaintiff's claim should be registered in respect of the mahal in dispute under the Bengal Land Registration Act. Now in regard to the terms of the *Solehnama*, we have no doubt it was intended that the management of *Sankarpur* should continue entirely in the hands of Dhanpat, for it is provided that he should remain in possession and management of the property, and it also provided, apparently on an estimate of the probable assets, that Chhattraput should receive payment of Rs. 1,200, annually. So far, therefore, there was no intention in either of the parties that there should be any interference with the rights that Dhanpat had hitherto exercised during the lifetime of Luchmipat and up to the time of the compromise. The terms of the deed in regard to the registration of the plaintiff's name as co-trustee have given rise to the dispute between the parties.

" It seems to us that what was really in contemplation was that the rights of the co-trustee which were given by the will to Luchmipat, the plaintiff's father, and descended to him by inheritance in

the same way as the defendant has inherited the rights of Dhanpat should be preserved by some recognition of the opposite party so as not to interfere with any right of Chhattrapat's heirs, or of his own, should it be necessary at any time to assert the same. It is not for us to consider what the effect of the refusal of the Revenue authorities to register Chhattrapat's name under the Land Registration Act would be, nor have we any authority as has been pointed out, to direct, if we were so inclined, that the Revenue authorities should so register him on their records. It is sufficient for us to state in the present case that the deed contemplated that there should be no interference with any act of Dhanpat and, therefore, of Dhanpat's heirs in the management of the property. We do not, of course, mean to say that this should restrain the plaintiff or any one else from taking action in the case of malversation. But it clearly contemplated that there should be no interference with the legitimate excercise of duties as manager of Sankarpur. There was no necessity for the Subordinate Judge to declare the plaintiff's rights to receive an annual allowance of Rs. 1,200 out of the property, seeing, as we are informed, that the plaintiff simultaneously with the present suit has brought a suit also for the arrears of this allowance which accrued due for some years past and has also obtained a decree.

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" The result, therefore, is that, in our opinion, the plaintiff is not entitled in any way to bring the present action for which no sufficient grounds exist. The decree of the lower Court will, therefore, be set aside, and the suit dismissed with costs in both Courts."

The appellant, thereupon, preferred the present appeal to His Majesty-in-Council.

Ross, for the appellant : The High Court misconceived the nature of the suit and failed to correctly interpret the terms of the compromise and the decree dated March 24, 1893, founded thereon, that the Court erred in holding that no sufficient grounds existed for the suit, and that the appellant was not entitled to bring it. The appellant was entitled to the relief claimed in the plaint. The decree of the Subordinate Judge granting the appellant that relief was right. The High Court set aside that decree on insufficient grounds.

DeGruyther for the respondents was not called upon.

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Their Lordships' judgment was delivered by

Lord Macnaghten:—Their Lordships do not think it necessary to call upon the respondents. They concur in the reasons stated in the Judgment of the High Court.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed. The appellant will pay the costs of it.

Solicitor for appellant—*G. C. Farr.*

Solicitors for respondents—*J. L. Wilson & Co.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Wallis.

Kunhi Kannan .. Appellant*
v. (*Plaintiff.*)
Mannayatha Suppi and others .. .. Respondents
(*Defendants*).

Kannan v. Suppi.

Malabar Law—Decree against karnavan—Subsequent division into Tavazhi—Procedure.

The members of a tarwad cannot escape liability for debts or decrees binding on the tarwad by dividing themselves into tavazhies; but where the karnavan of the original tarwad has ceased to represent them they cannot be bound by proceedings in execution of a decree against him unless they are separately represented in the execution proceedings.

[*Sankara* v. *Kelu* refrreed to.]

Second Appeal from the decree of the District Court of North Malabar in A. S. No. 491 of 1902, presented against the decree of the Court of the District Munsiff of Tellicherry in O. S. No. 455 of 1901.

The Court delivered the following

JUDGMENT:—In this suit the plaintiff sues for possession of certain land which he purchased at a Court auction in execution of the Small Cause Court decree 1489 of 1876 which had been obtained against the Karnavan of the Paloli Edan tarwad in respect of a debt binding on the members of the tarwad. To this suit the 11th defendant pleaded that subsequently to the decree and prior

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*S. A. No. 133 of 1904. 13th January 1908.

1. (1889) I. L. R. 14 M. 29

Kunhi Kannan v. Mannayatha Suppi.

to the execution proceedings the Paloli Edan tarwad divided itself into two tavezhis, the Thachormal and the Kunnumal, and that the suit land was allotted to, and became the property of, Thachormal Tavezhi to which he belongs, and that the sale in execution of the decree is not binding on the Tachormal Tavezhi as no member of this Tavezhi was made a party to the execution proceedings. Both the lower Courts have upheld this contention on the authority of *Sankara* v. *Kelu*, [1] and we agree with the conclusion at which they have arrived. The members of a tarwad cannot escape liability for debts or decrees binding on the tarwad by dividing into two tavezhis as held in S. A. No. 1323 of 1894 reported in a note to *Kunhappa Nambiar* v. *Shridevi Kettilamma*, [2] but, as held in the latter case when the Karnavan of the original tarwad has ceased to represent them they cannot be bound by proceedings in execution of a decree against him unless they are separately represented. According to the finding of the lower appellate Court in this case, the members of the Thachormal Tavezhi were not represented in the execution proceedings now in question, and consequently the court sale at which the plaintiff purchased is not binding on them and the appeal must be dismissed with costs.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[APPEAL FROM THE JUDICIAL COMMISSIONER'S COURT, OUDH.]

Present:—Lord Robertson, Lord Collins and Sir Arthur Wilson.

Muhammad Naseem .. Appellant*

v.

Mirza Muhammad Abbas Ali Khan .. Respondent.

Muhammad Naseem v. Muhammad Abbas.

Mortgage deed—Construction—Estoppel by judgment—Privy Council practice

A clause in a mortgage deed ran as follows :—

"In case of default in payment by me (mortgagor) of instalments of interest at the time herein appointed, the mortgagee shall have immediatly on such default, power either to recover the whole of his principal, interest and (*Sud mand munafa mazkura*) further interest on the said interest according to the rate herein fixed . . . . . . or the said mortgagee shall in default of payment of the instalment or instalments of interest aforesaid take possession of the mortgaged property."

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* 11th December 1907

1. (1889) I. L R. 14 M. 29.

2. (1895) I. L. R. 18 M. 451.

Muhammad Naseem v. Muhammad Abbas.

Held :—On a construction of the clause, that the mortgagor was not liable for compound interest, the mortgagee in the case having entered into possession.

Another clause provided that an enhancement of the revenue at a re-settlement and a consequent shrinkage, shall give the mortgagee a cause of action.

Held also on a construction of the whole deed in question, that the mortgagee was entitled to get from the mortgagor, over and above the usufruct, the amount paid by him on account of maintenance and enhanced Government revenue.

A third clause ran as follows .—

"Whenever after the term of the mortgage or during the said term I pay to the morgagee in any Khali Fush (fallow season) *i. e.*, in the month of Jeith, the whole of the mortgage money and the whole of interest together with the Government revenue arrears of rent and takavi advances from tenants. . . . . without raising any objection of law such as limitation . . . I, the mortgagor, shall have the power to redeem.

Held on a construction of this clause that the mortgagee was entitled to get the money due to him from the tenants on account of arrears of rent whether its recovery is barred by limitation or not.

The mortgagee in the case brought a suit against the mortgagor alleging that a certain sum was due to him on the date of suit and praying for possession, or, in the alternative, for recovery of the amount with further interest. The Commissioner appointed for the purpose of taking accounts reported that a certain sum was due. The Court held that there was no necessity for passing an order as to the amount due beyond saying that the account was correct and placed the mortgagees in possession. The amount was arrived at by calculating compound interest on unpaid instalments.

Held that in a subsequent suit by the mortgagor or his assignee for redemption, the plaintiff was not precluded from contending that compound interest was not payable.

Held also that the costs of the prior suit were not to be included in the accounts in favor of the mortgagees, there being nothing in the mortgage deed to support it.

Their Lordships declined to allow a party to raise a point not taken in both the Courts below.

Consolidated appeals from two decrees of the Court of the Judicial Commissioner of Oudh (July 27, 1904), which varied a decree of the Court of the Subordinate Judge of Bara Banki (November 29, 1902).

The principal question involved in the case was the settlement of the terms on which the above-named Muhammad Naseem, hereinafter called the appellant, was entitled to redeem a mortgage, dated September 30, 1885.

The said mortgage was executed by Chaudhri Imdad Ashraff in favour of the above named Mirza Muhammad Abbas Ali Khan, hereinafter called the respondent. The property mortgaged

Muhammad Naseem v. Muhammad Abbas.

lost (entirely) owing to drought, hail-storms, new settlements, or other accidents, or if the mortgagee has to pay the Government revenue, etc., from his own pocket, or if any rights of interest in the mortgaged property are attached and proclaimed for sale in execution of any decree, or if the whole or any part of the mortgaged property passes out of my ownership on the claim of any person under the orders of the Government, then in all such cases the mortgagee shall have the right to recover the principal and interest together with other expenses specified in this deed from me personally and from the mortgaged property, as well as from my other properties of any description. I and my representatives shall have no objection to pay the same.

(x). That whenever after the term of the mortgage or during the said term I pay to the mortgagee in any *khali fasl* (fallow season) *i.e.*, in the month of Jeith, the whole of the mortgage-money and the whole of interest together with Government revenue, arrears of rent and *takavi* advances due from tenants, and other expenses incurred under the terms of this document, without raising any objection of law such as limitation, etc., I, the mortgagor, shall have power to redeem the mortgaged property.

(xi). That I shall have power to pay the principal mortgage-money within the term of the mortgage by instalments, provided the amount of such instalment is not less than a thousand rupees, and interest on the instalments paid shall be credited to me in the account.

(xii). That during the continuance of the mortgage and after the redemption of the mortgaged property, I and my representatives shall have no claim to any income, profits or damages of any description against the mortgagee or his representatives.

On November 4, 1886, the mortgagor paid Rs. 2,699-8-0 on account of principal and from April 4, 1886, to May 29, 1892, he paid various sums amounting to Rs. 13,461 on account of interest.

On September 15, 1892, the mortgagee sued the mortgagor, who had failed to pay the instalments of interest in accordance with the terms of the mortgage-deed, for possession of the mortgaged property. On September 18, 1893, his claim was decreed with costs amounting to Rs. 1,765-2-0 by the District Judge of

Muhammad Naseem v. Muhammad Abbas.

Fyzabad and on January 27, 1894, the mortgagee obtained possession of the mortgaged property. The following were the issues fixed in that suit :—

"1. Is the account filed by the plaintiff correct ?

"2. If not, what sum is due to plaintiff, or rather what sum is due to plaintiff under the mortgage-deed ?"

The judgment of the District Judge of Fyzabad ran as follows :—

"CLAIM.—For possession of the property mortgaged, specified in the margin, entire village Ilyaspur and half of the shares in villages Husainabad, Patti Yakub and Karwenan, and of 6 annas share in village Olhepur, Pargana and Tahsil Haidergarh, District Bara Banki, or for Rs. 33,088-13-3½, principal Rs. 26,300-8 and interest Rs. 6,788-5-3½, on a bond dated 30th September 1885.

Judgment.—As to the issues fixed, the defendant agreed to accept the oath of Har Parshad. Har Parshad has taken the oath adversely to defendant, so the accounts filed by plaintiff (*i.e.*, as corrected by the Commissioner) must be regarded as accurate.

As plaintiff sues for possession, I give a decree for possession of the mortgaged property as claimed. There is no necessity for passing any order as to the amount due under the mortgage to plaintiff, beyond saying that the account filed by plaintiff after the correction reported by the Commissioner is correct.

Decree for possession of property in suit in favour of plaintiff with costs."

On June 11, 1894 the same District Judge dismissed, with costs amounting to Rs. 201-6-0, an application for *review of judgment* which had been filed by the mortgagor.

The mortgagor on December 21, 1899 sold the village of Ilyaspur to the appellant, who on June 5, 1900, tendered a sum of Rs. 37,000 to the mortgagee in redemption of the mortgage. The tender was refused.

On June 12, 1900, the mortgagor and the appellant instituted against the respondent the present suit in the Court of the Subordinate Judge of Bara Banki for redemption on payment of Rs. 27,289-1-5, in accordance with accounts annexed to the plaint.

In defence the respondent filed a written statement. He did not deny the right to redeem, but claimed that he was entitled to receive on redemption over Rs. 50,000. The points in dispute are sufficiently indicated by the issues, which were as follows :— Muhammad Naseem v. Muhammad Abbas.

i. Has the amount due to the defendant been settled in former suit *in re* Mirza Muhammad Abbas Ali Khan *v.* Chaudhri Imdad Ashraf ?

ii. If so, is the matter *res-judicata* ?

iii. Is defendant entitled to (*a*) interest and (*b*) compound interest on the amount due to him on the date he obtained possession ?

iv. If so, at what rate ?

v. Has defendant cut down any trees, and if so, of what value ?

vi. Is defendant liable to be debited with such value ?

vii. Are there any, and what arrears of rent due from tenants ? and is defendant entitled to the same ?

viii. Is defendant entitled to get from the plaintiff over and above the usufruct of the mortgaged property, the amount paid by him on account of *Guzara* and enhanced Government revenue ?

ix. What amount is defendant entitled to get before plaintiff can obtain redemption ?

x. Did plaintiff tender Rs. 37,000 to the defendant on the 5th June 1900, and was the tender proper and sufficient to pay off the mortgage ?

xi. If so, what is the effect of defendant's refusal to receive the amount ?

On November 29, 1902, the Subordinate Judge delivered his judgment. He decided the first and second issues in favour of the plaintiffs. On the third and fourth issues he decided that on the true construction of clause 4 of the mortgage-deed compound interest was payable at the rate of 10 per centum per annum. On the fifth and sixth issues, he allowed the mortgagor a sum of Rs 100. On the seventh he held that Rs. 225-3-3 should be allowed to the mortgagee for arrears of rent. He decided the eighth issue in favour of the mortgagee in the following terms:

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"The *Guzara* item, the plaintiffs have allowed in their abstract of accounts annexed to their plaint. This matter is not under controversy and as to the question of Government Revenue at the enhanced rate, I think the defendant is entitled to charge it on the plaintiffs. Clause 4 of the mortgage-deed supports his demand, and I answer this issue in the affirmative."

On the ninth issue, he allowed the mortgagor credit for rent on plots of land cultivated by the mortgagee. He decided the tenth and eleventh issues in favour of the plaintiffs. In the Court of the Judicial Commissioner at the hearing of the appeals the mortgagee admitted the fact of the tender having been made.

By his decree he ordered an account to be taken on the basis of the above findings and decreed redemption on payment of the amount determined by that account.

Both parties, thereupon, appealed to the Court of the Judicial Commissioner of Oudh, which Court heard the two appeals together and delivered judgment on February 22, 1904. It held that on the true construction of the mortgage-deed compound interest was not payable in the event of the mortgagee taking possession of the mortgaged property. Their Lordships upheld that finding and agreed with the following reasoning for the same :—

"It was contended on behalf of the plaintiffs that the expression *sud mazid munafa mazkura ka* in clause 4 does not mean compound interest at all. I cannot accept this contention. The word *munafa* is used in the deed as a euphemism for interest and the literal translation of these words is "further interest of (or on) the interest." It appears to me quite clear that if the mortgagee had not taken possession under the last part of clause 4 he would have been entitled to claim compound interest, but this clause gives the mortgagee two alternatives; he may either sue for principal, interest and compound interest and costs, etc., or take possession of the property, but he cannot do both. Upon taking possession, the rights of the mortgagor and himself are regulated by clauses (5) to (10), and as nothing is said about compound interest in any of those clauses, the mortgagee cannot claim compound interest in case the net profits fall short of the interest. The provision in clause 7 that the mortgagee may take

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the balance or net profit in lieu of interest seems to mean that he may take in lieu of simple interest on the amount of the principal for the time being remaining unpaid, and not as contended by the mortgagee, interest upon the principal and interest due at the time when the mortgagee took possession. The effect of Clauses 7 and 10 taken together is that upon redemption, in case the net profits have been less than the simple interest payable under the deed, an account must be taken of those profits [for the period during which the mortgagee was in possession] but in case the net profits have been equal to or greater than the simple interest, then no account need be taken of them for the period. In both cases the mortgagor must, upon redemption, pay to the mortgagee the amount due from the tenants on account of rent or advances, the amount of any additional revenue imposed by Government on a re-settlement of the land, and any sums decreed against the property and paid by the mortgagee. The Subordinate Judge held that compound interest was payable up to the date on which the mortgagee took possession, because he did not see why the stipulation for compound interest should apply only if the mortgagee sued for his money and not if he took possession. But the answer to this view is that the mortgagee is clearly given a choice of two remedies, and, having elected to take possession, he cannot claim the benefits of the other alternative. The terms of the contract so construed may seem rather strange, but the contract must be interpreted as it is, and not according to any notion of what would have been a reasonable arrangement. The deed, as it stands, provides for compound interest only in the case of a suit brought by the mortgagee on the occurrence of a default in payment of interest.

Mr. Jackson on behalf of the mortgagee admitted that according to the construction of the deed which I have adopted, the interest due to the mortgagee while in possession has been recovered out of the profits, and he said that an account should not be taken for that period."

It upheld the finding of the Subordinate Judge on the first and second issues relating to *res-judicata* for the following reason, which were adopted by their Lordshps in upholding that finding :—

" On September 15, 1892, the mortgagee brought a suit against the mortgagor alleging that there was then due to him a

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sum of Rs. 33,087-13-3½ and praying for a decree for possession of the property or, in the alternative, for recovery of that sum with further interest. A Commissioner appointed to make up the accounts reported that Rs. 33,087-9-8½ were due to the mortgagee at the date of the suit. The Court in giving judgment held that there was no necessity for passing any order as to the amount due under the mortgage beyond saying that the account was correct and then proceeded to give the mortgagee a decree for possession. The amount alleged to be due by the mortgagee and found due by the Commissioner was arrived at by calculating compound interest on unpaid instalments of interest. It is contended by the mortgagee in the present suit that the decree in the previous suit must be accepted as settling the amount due to the mortgagee on September 15, 1892 It has often been held that when a mortgagee sues for possession as mortgagee, the Court should not determine the amount then due, but should leave the accounts to be settled when the mortgagee sues for sale or foreclosure or the mortgagor sues for redemption. It appears to me quite clear that the Court did not in the suit brought by the mortgagee decide the question of the amount due to the mortgagee. It expressly refrained from doing so. It may be that the mortgagor did not in that suit dispute the right of the mortgagee to compound interest, but nothing has occurred to raise an estoppel against him and therefore he may now show, if he can, that under the terms of the deed compound interest is not payable."

The finding of the Subordinate Judge as to the value of the trees was accepted; and it was not disputed that rent for land cultivated by the mortgagee was properly allowed. The mortgagee was also allowed credit for the amount paid by him for maintenance, for enhanced Government revenue and for mutation of names, and also for the costs of the previous suit. An order was made remanding the case to the Court of the Subordinate Judge to report "what amount was due to the mortgagee on the date of the tender, and if the amount tendered was insufficient, what amount would be due to the mortgagee on the 15th June, 1904, and if the amount tendered was sufficient, and the plaintiffs so desired, what amount was due to the mortgagee after debiting him with the gross profits for the period subsequent to the tender."

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On April 7, 1904, the Subordinate Judge returned his finding. He decided that the tender was insufficient and that on the 5th January, 1904, the sum due to the mortgagee was Rs. 41,040-6-3, and in addition the arrears due from tenants, the amount of which could not be ascertained, and that the same amount would be due to the mortgagee on the 15th June, 1904. The following were his reasons with which their Lordships agreed, for his finding, which was upheld by their Lordships, in connection with arrears of rent, due to the mortgagor, whether statute-barred or otherwise :—

" It is admitted on behalf of the parties that the mortgagee did not advance any money as *takavi*. It was further admitted that at the end of fasli 1307 the amount due from the tenants on account of arrears of rent was Rs. 301-2-9, out of which the recovery of Rs. 190-3 was barred by limitation, while the recovery of the remaining sum of Rs. 110-5-9 was not so barred.

It was contended on behalf of the plaintiffs that the mortgagee could get Rs. 110-5-9 only.

The 10th provision of the mortgage-deed runs thus :—

' When in the Jeith fallow season whether within the specified term or after it has expired, I pay to the said mortgagee the whole principal and interest with the revenue and amount due from the tenants on account of advances or arrears of rent and other expenses according to the terms of this deed, without legal objection as to limitation, &c. (*bila uzr a qanodni hadde samaet waghairakes*), then I shall be entitled to redeem the mortgaged property.' I am, therefore, of opinion that the mortgagee is entitled to get the money due to him from the tenants on account of arrears of rent, whether its recovery is barred by limitation or not."

In the meantime both parties had applied to the Court of the Judicial Commissioner of Oudh for a review of judgment. The following is taken from the order of the Court passed on the plaintiffs' application :

" The first, second and third paragraphs of the application refer to the costs decreed to the mortgagee in the previous suit. We held that the amount of those costs should be taken into consideration in calculating the amount due to the mortgagee.

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It is said that the mortgagee did not claim those costs in the present suit and the reason may be, as the applicants allege, that the mortgagee has taken out execution of the decree which he obtained.

"In writing the judgment, I certainly omitted to notice this. I would admit this application as regards the costs in question.

"The fourth, fifth and sixth paragraphs of the application challenge our decision that the mortgagee is entitled to receive from the mortgagor the amount paid by him on account of enhanced revenue, and the amounts paid on account of maintenance. It is contended that this question was not raised at the hearing, but our notes show that it was raised. Mr. Jackson on behalf of the mortgagee distinctly urged that his client was entitled to those sums. For the applicants it is urged that the seventh clause of the deed has not been correctly translated in the judgment. The clause was not translated as literally as it might have been. It might be translated thus:—'In case he takes possession of the mortgaged property, the mortgagee may after paying the Government revenue and other sums assessed by Government, which may hereafter be assessed or fixed by Government.'

"It is said that the words 'which may hereafter be assessed or fixed by Government' refer to additional revenue which might be assessed, but the construction of the sentence shows that this is not the meaning, and clause 9 of the deed supports this construction, because it provides that an enhancement of the revenue at a re-settlement and a consequent shrinkage of the property shall give the mortgagee cause of action. Taking the various clauses of the deed together, I think there can be no doubt that the intention was that the mortgagee should be entitled to be paid the amount of any enhancement of the revenue. A provision that a mortgagee may after defraying certain expenses take the profits remaining in lieu of the interest even if they exceed the interest, and that the mortgagor shall pay unexpected charges such as enhancements of revenue is commonly found in mortgage deeds, and the validity of such a provision has never been challenged.

"As regards the sum paid on account of maintenance the position is still clearer. It cannot have been intended that the mortgagee should pay these sums out of the profits and have no

right to recover them from the mortgagor. Indeed Mr. Lincoln, who appeared for the applicants, was unable to point to anything in the deed to justify his contention except the word '*waghaira*' in clause 7. The fourth, fifth and sixth paragraphs of the application for revision are merely an attempt to re-open a question argued and decided at the hearing of the appeal.

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"In my opinion, except in regard to the costs of the previous suit, no sufficient ground has been established for a review of the judgment of this Court. As regards those costs, I would admit the application and direct that notice be issued to the mortgagee Muhammad Abbas Ali Khan.

"The date fixed for the hearing should be the same as that fixed for the disposal of the appeal after the findings of the Court below have been received."

The two appeals were finally disposed of on July 27, 1904. The mortgagee was not allowed credit for costs of the previous suit, nor for the cost of the office as well. He was allowed credit for arrears of rent, whether barred by limitation or not. In the result, two decrees were made in the two appeals, which directed redemption on payment of Rs. 39, 871-6-3. The judgment contained the following :—

"The question of the costs incurred by the mortgagee in the previous suit must now be decided. Mr. Jackson on behalf of the mortgagee contends that the costs of the previous suit were properly incurred by his client in enforcing his security, and he has referred to some English authorities which seem to show that in England the mortgagee would certainly be entitled to add such a sum to the mortgage-money. There seems to be no Indian authority on the question. S. 92 of the Transfer of Property Act provides only for the taking of an account of the mortgage-money, and of the costs of the suit for redemption. The mortgage-deed does not provide that the mortgagee may add to the mortgage-money the costs of the suit for possession brought under Clause 4 of the deed. These costs were claimed by the mortgagee in his written statement, but the claim does not seem to have been pressed in the Court below. It was not put forward in the memorandum of appeal, and it was not mentioned in the course of the argument in this Court.

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"Upon further consideration, I think that the costs of the previous suit should not be allowed. The law does not provide for them, nor does the contract between the parties; and as a matter of fact the mortgagee endeavoured to realize those costs in execution of the decree which he obtained. As regards these costs, then, I think that the application for review should be allowed. * * * On behalf of the mortgagor it is contended that the Subordinate Judge in ascertaining the amount due at the date of the tender was wrong in taking into account arrears of rent the recovery of which was barred by limitation at the date of the tender. But, in my opinion, the tenth clause of the deed is perfectly clear. It provides that the mortgagor shall, upon redemption, pay amongst other items the amounts due from tenants on account of advances [*takavi*] or arrears of rent, whether recovery of such amounts is barred by limitation or not. I cannot accept the argument that this provision applies only to sums claimed on account of enhancements of revenue and other expenses [*ikhrajat*]; no question of limitation could arise as to them, whereas a question of limitation might arise and in fact has arisen with regard to the arrears of rent. Therefore, in my opinion, in considering whether the sum tendered on June 5, 1900, was or was not sufficient, the whole amount then due from tenants on account of rent or advances, namely, Rs. 301-2-9, should be allowed."

The appellant, thereupon, preferred two appeals, which were consolidated, to His Majesty in Council. The respondent, on the other hand, filed a cross-appeal by special leave of His Majesty in Council for the following "reasons":—

1. Because the amount due to the mortgagee was determined in the previous suits, and the parties are bound by the finding of the Court on that question.

2. Because the respondent is entitled to compound interest after the date up to which the interest and the compound interest were included in the account taken in the previous suit.

3. Because, owing to the non-production of the original sale-deed executed by the mortgagor in favor of the plaintiff, the suit of the plaintiff should have been dismissed.

4. Because the costs of the previous suit should have been added to the amount awarded to the defendant in the present suit, with interest thereon.

5. Because the respondent is entitled, (*a*) to interest on the costs of the mutation proceedings, (*b*) the costs of preparation of the well and the thana with interest thereon, (*c*) interest on the amount paid on account of maintenance and the enhanced revenue.

Their Lordships' judgment was delivered by

Lord Collins :—This is a consolidated appeal from a decree of the Court of the Judicial Commissioner of Oudh. The principal appellant obtained leave to appeal in India in the usual way. The cross-appellant obtained from His Majesty in Council special leave to appeal.

The question in this appeal turns upon the construction of a deed of mortgage and relates to the terms upon which the mortgagor was entitled to redeem. The mortgage was executed by one Chaudhri Imdad Ashraf in favour of the respondent on the 30th September 1885. The material parts of the deed are set out in the record and are abstracted in the judgment below and need not be here repeated. The mortgage money was Rs. 29,000 and the rate of interest 10 per cent. per annum. By the 15th September 1902 the mortgagor had paid in all Rs. 13,461 on account of interest. On the 4th November 1886 he paid Rs. 2,699 on account of principal. Afterwards he made default in paying interest, and the mortgagee instituted a suit for possession and, on the 18th September 1893, got a decree under which he was put into possession on the 27th June 1894. The mortgagor, on 21st December 1899, sold a portion of the mortgaged property to the appellant, Chaudhri Muhammad Naseem, who, on the 5th June 1900, tendered to the mortgagee a sum of Rs. 37,000 in redemption of the mortgage. The tender was refused, and this suit for redemption was instituted by the appellant and the mortgagor. One of the chief matters of controversy was whether compound interest was in the circumstances payable by the mortgagor. This point was decided by the Subordinate Judge in favour of the mortgagee, but on appeal the Judicial Commissioner took a different view and disallowed it. There were also other items in the account as to which disputes arose which were decided by both Courts in favour of the mortgagee. The result was that on an account taken on the basis of the interpretation and findings adopted by the Judicial Commissioner it appeared that the sum of Rs. 37,000 which, on the 5th June 1900,

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had been tendered by the mortgagor and refused by the mortgagee as the sum payable to entitle the former to redeem, was less than the true amount as ascertained by the Judicial Commissioner's judgment by about Rs. 200. Against this decision both sides appealed, after having first been heard on motions to vary in certain respects the terms of the decrees. Naturally on the hearing of the appeals before this Board, each side tried to vary the account in his favour by attacking particular items so as to establish or destroy the sufficiency of the tender.

A number of these controverted items had involved inquiry into the facts in the Court of first instance, and were accordingly reported upon by a Commissioner appointed by the Subordinate Judge, who made the report the basis of his decision. It is, of course, impossible for this Board to review findings of fact on such materials, nor were they invited to do so, but it will be found that the real controversy narrows itself down to some two or three questions of principle, which have been discussed and decided in the Courts below. These questions would appear to be :—

(1) On the true construction of the agreement, is the mortgagor liable for compound interest since the mortgagee entered into possession of mortgaged premises ?

(2) Is the mortgagee entitled to get from the mortgagor over and above the usufruct of the mortgaged property, the amount paid by him on account of maintenance and enhanced Government revenue ?

(3) Is the mortgagee entitled against the mortgagor to arrears of rent due from tenants even where such arrears are statute-barred as against the tenants ?

(4) Is the mortgagee entitled to credit for the whole of the profits during the period when, in consequence of part payment, the whole debt was no longer due ?

(5) Is the mortgagor entitled, on taking of the accounts, to interest on payment made by him in discharge of the principal ?

Their Lordships will consider these points in their order :—

First, as to compound interest. This turns upon the construction of clause 4 of the agreement. On this point their Lordships agree with the reasoning and interpretation of the Judicial Commissioner.

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Secondly, as to maintenance and enhanced revenue, even if the point as to maintenance is still open to the mortgagor, which is doubtful, their Lordships adopt the construction of the agreement on those points in which both the Courts below concurred.

Thirdly, as to statute-barred rent their Lordships agree that this point, as held by the Subordinate Judge, is met by the express language of the 10th clause of the mortgage-deed.

Points 4 and 5 were not taken by the mortgagor either before the Subordinate Judge or the Judicial Commissioner, and are not now open to the mortgagor; neither is there anything to be found in the agreement to support them.

With regard to these "reasons" put by the mortgagee for his cross-appeal to His Majesty in Council, their Lordships adopt the conclusions and reasons of the Court below on 1st, 3rd and 4th of those "reasons." The second reason raises the question of compound interest, which has already been dealt with. The fifth is not open to the mortgagee; the fact that he abstained from taking it is made the subject of comment by the Commissioner.

The result is, in the opinion of their Lordships, the appeal and cross-appeal all fail, and they will therefore humbly advise His Majesty that they should be dismissed.

The costs of the appeal will be borne by the respective appellants.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Before Mr. Justice Benson and Mr. Justice Munro.

The Madras Electric Tramways Co. .. Appellants*
(in appeal No. 3922-'07 on the file of the Presidency Magistrate's Court, Georgetown, Madras.)

v.

The Madras Corporation .. .. Respondent
(in Do.)

Madras Tramways Co. v. The Madras Corporation.

Madras Acts—City Municipal Act III of 1904, † Sch. VI, Cl. 1—"Propelled"—"Trailer Cars."

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* Ref. C. No. 9 of 1907. 4th December, 1907.

† Madras Act III of 1904, Schedule VI, Cl. 1.—For every four-wheeled vehicle with springs drawn by two or more horses or propelled by electricity, gas, steam or any other mechanical power: Rs. 15-0-0.—Ed.]

Madras Tramways Co. v. The Madras Corporation.

Trailer cars are vehicles with springs and are "propelled" within the meaning of the words as used in Sch VI of Madras Act III of 1904.

Case stated at the request of the appellants under S. 176 of the Madras City Muncipal Act III of 1904 by the 2nd and 3rd Presidency Magistrates, George Town, Madras, in A. S. No. 3922 of 1907 presented against the decision of the Madras Corporation in the matter of the assessment for taxation of four trailer cars.

The question in the case was whether trailer cars are "propelled by electricity" within the meaning of the words in Cl. 1 of Schedue VI of Madras Act III of 1904.

E. R. Osborne and *Orr, David* and *Brightwell* for appellants.

P. R. Sundara Aiyar for respondent.

The Court delivered the following

JUDGMENT :—We agree with the Magistrate that the trailer cars in question are liable to pay a tax of Rs. 15 each under Schedule VI of the Act (Madras Act III of 1904). They are vehicles with springs and we have no doubt that they are propelled. "Propelled" in this Schedule indicates that the vehicle must have the motive power within itself as contended by Mr. Osborne on behalf of the Tramway Company.

If that contention were admitted, it would exclude the leading tram car as well as the trailer, for the leading car does not itself generate the electricity or carry a store of it. It merely contains appliances by which the electricity carried along the wires from the generating station causes the car to move.

We think that electricity is the power that makes all the cars move and that all are equally propelled by the electricity.

The Municipality is entitled to costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Miller.

Ponnayee .. .. .. Petitioner*

v.

Periya Mooppan .. .. Counter-Petitioner.

Cr. P. C., S. 488—"May"—Discretion.

Ponnayee v. Periya Mooppan.

The use of the word "may" in S. 488, Cr. P. C., shows that a Magistrate has a discretion to decide in what cases the award of maintenance may properly be made, though the discretion must be exercised judicially and reasonably and not capriciously.

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* Cr. R. C. No. 441 of 1907. 5th February 1908.

Held also that the refusal to make an order for maintenance against the husband on the ground of the woman living in adultery with a low-caste man, was a proper exercise of the discretion vested in the magistrate.

Ponnayee v. Periya Mooppan.

Case referred for the orders of the High Court under S. 438 of the Criminal Procedure Code by the District Magistrate of Salem in Mis. C. 41 of 1907, dated 1st November 1907.

T. Subrahmanya Aiyar for petitioner.

T. Narasimha Aiyangar for counter-petitioner.

The Court made the following

ORDER:—We are not prepared to say that the view taken by the Deputy Magistrate as to the construction of S. 488, Criminal Procedure Code, is wrong. We think that the use of the word "may" in that section as distinguished from "shall" shows that the magistrate has a discretion to decide in what cases the award of maintenance may properly be made. No doubt, the discretion must be exercised judicially and reasonably, not capriciously. This was the view taken by *Benson* J. in the case of *Gantapalli Appalamma* v. *Gantapalli Yellayya.*[1]

In the present case the Deputy Magistrate did not refuse to award maintenance, because the petitioner was "living in adultery," but because she had been guilty of adultery with a low caste man, which led to her expulsion from caste, and thus as we take it, rendered it, in effect, impossible for her to live with him without himself losing the society of his fellow caste-men. We are not prepared to say that in these circumstances the Deputy Magistrate was wrong in refusing to award her maintenance.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis and Mr. Justice Sankaran Nair.

Munisami Mudaliar .. .. Appellant*
(*Plaintiff*).

v.

Subbarayar and others .. Respondents
(*Defendants*).

Trusts Act, S. 84—Scope of—Benami transfer in fraud of creditors—Fraud not carried out—Contract to sell by transferee with a third person—Plea of benami transfer by transferor—Estoppel.

Munisami v. Subbarayar.

Where a person transfers property to another benami in order to defeat creditors, and the purpose is not carried out, the transferor is not estopped from relying upon the

* Ap. No 72 of 1904. 8th December 1907.

1. (1897) I. L. R. 20 M. 470; F. B.

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benami nature of the transaction in a suit for specific performance of a contract to sell entered into by the transferee with a third person.

[View of *Benson* J. in *Yaramatih Krishnayya* v. *Chandra Bapayya*[1] doubted; *Kearley* v. *Thompson*[2] not followed; *Jadu Nath Poddar* v. *Rup Lal Paddar*[3] distinguished.]

S. 84 of the Trusts Act sufficiently declares the law and policy to be enforced by Courts in India.

Appeal from the decree of the Subordinate Judge's Court of Negapatam dated 26th December 1903 in O. S. No. 9 of 1902.

P. R. Sundara Aiyar and *T. Narasimha Aiyangar* for appellant.

T. V. Seshagiri Aiyar for respondents.

The Court delivered the following

JUDGMENTS :—*Wallis* J:—I agree with the conclusion arrived at on the evidence, by the Subordinate Judge, that the deed, Exhibit *G* executed by the 2nd defendant in favour of his son 1st defendant, and of his other son, the deceased husband of the 3rd defendant, was a benami transaction entered into with a view to defraud the creditors of the 2nd defendant, but it does not appear that any of the creditors was in fact defrauded, and under these circumstances the question before me is whether a suit for specific performance of a contract by the 1st defendant to sell the lands included in Ex. *G* to the plaintiff can be successfully resisted by the 2nd defendant so far as regards his share in the lands is concerned on the ground that Ex. *G* was a mere benami transaction? If any creditor had been defrauded he would, it is well settled, have been debarred from going behind Ex. *G*—*Rangammal* v. *Venkatachari*[4] and *Yaramati Krishnayya* v. *Chandru Bapayya*[1]—but where the fraud has not been carried into effect he is not so debarred according to the decision of *Lord Romilly* M. R. in *Symes* v. *Hughes*[5] and of the Court of Appeal in *Taylor* v. *Bowers*.[6] Following these decisions, S. 84 of the Indian Trusts Act provides that where the owner of property transfers it to another for an illegal purpose, and such purpose is not carried into execution, the transferee must hold the property for the benefit of the transferor. In my opinion this section sufficiently declares the law and policy which ought to guide us in India and it is therefore immaterial that subsequently to the passing, doubts have

1. (1897) I. L. R. 20 M. 326.
2. (1890) 24 Q. B. D. 742.
3. (1906) I. L. R. 33 C. 967.
4. (1895) I. L. R. 18 M. 378.
5. (1870) L. R. 9 Eq. 475.
6. (1876) 1 Q. B. D. 291.

Munisami v. Subbarayar. — Wallis J.

been expressed by the Court of Appeal in *Kearley* v. *Thomson*[1] as to the soundness of the rule of law embodied in the section. This rule was recognised by *Subrahmanya Aiyar* J. in *Rangammal* v. *Venkatachari*.[2] The provisions of S. 84 of the Indian Trusts Act are not referred to in the judgment of *Benson* J. in *Yaramati Krishnayya* v. *Chandru Papayya*[3] and in so far as that judgment lays down a stricter rule than is embodied in the section, I am unable to agree with it That case, it should be further observed, was disposed of by *Subrahmanya Aiyar* J., the other judge, on other grounds. The Indian decisions on this question have been reviewed in great detail in *Jadu Nath Poddar* v. *Rup Lal Poddar*[4] relied on for the appellant. It does not come within the rule, as there the illegal purpose had been carried into execution and a decree-holder, it was found, had been cheated out of his just rights. The question argued in that case was whether in such case the rule, which debars a plaintiff from obtaining relief on the ground of his own fraud, equally debars a defendant from pleading it in answer to a suit against him. The answer which was in the affirmative does not affect the present question, and it is to be observed that the learned Chief Justice who delivered the judgment of the Court was one of the judges who decided *Goberdhan Singh* v. *Ritu Roy*[5] in which the distinction between cases in which the fraud has or has not been carried into effect was recognised. For these reasons, I am of opinion that the appeal must be dismissed with costs.

Sankaran Nair J :—I agree.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present.:—Mr. Justice Wallis and Mr. Justice Munro.

Peria Karuppan .. .. Appellant*
v. (*3rd Defendant.*)
Subramanian Chetti and others .. Respondents
(*Plaintiff* and *Defts.* 1 *to* 4.)

Peria Karuppan v. Subramanian.

Landlord and tenant—Notice—Tenant under usufructuary mortgagee—Disclaimer in written statement—Estoppel.

A denial of the landlord's title for the first time in the written statement in an ejectment suit does not disentitle the tenant from pleading want of notice.

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* S. A. 131 of 1905. 18th February 1908.

1. (1890) 24. Q. B. D. 742.
2. (1895) I. L. R. 18 M. 378.
3. (1897) I. L. R. 20 M. 326.
4. (1896) I. L. R. 33 C. 967.
5. (1896) I. L. R. 23 C. 962.

Peria Karuppan v. Subramanian.

A tenant of the usufructuary mortgagee is entitled to a reasonable notice before ejectment by the mortgagor.

Held also that a 15 days' notice in the middle of the cultivation season was not a sufficient notice.

Second Appeal from the decree of the Subordinate Court of Madura East in A. S. No. 252 of 1904 presented against the decree of the Court of the District Munsif of Sivaganga in O. S. No. 260 of 1901.

P. R. Sundara Aiyar and *C. V. Ananthakrishna Aiyar* for appellant.

T. Subrahmanya Aiyar for respondent.

P. R. Sundara Aiyar :—Notice ought to expire with the year of the tenancy and ought to be a six months' notice —*Hemangini Chowdhrani* v. *Sri Gobinda Chowdhury* ;[1] *Kishori Mohan* v. *Nund Kumar*.[2] In *Annammal* v. *Venkataragavachary*[3] one month's notice has been held insufficient. Without reasonable notice there is no valid termination of the tenancy.

T. Subrahmanya Aiyar :—The denial of the landlord's title in the written statement dispenses with the necessity for notice: *Kizhakkinyakath Abdulla Naha* v. *Moidin Kutti*[4] ; *Chidambaram Pillai* v. *Sabapathy*[5] ; *Mayavanjari* v. *Nimini*[6] ; *Woodfall* p. 387. Such a disclaimer may be taken as a proof of disclaimer earlier—*Doede Grubb* v. *Grubb*.[7] The cases against this view in Madras are cases where permanent tenancy was set up.

P. R. Sundara Aiyar.—In *Unhamma Devi* v. *Vaikunta Hegde*[8] it is taken as settled law that the disclaimer ought to be before suit. To the same effect are *Subba* v. *Nagappa*[9] ; *Abdulla Rowthen* v. *Subbarayar* ;[10] *Madavan* v. *Athi Nangaiyar*.[11] The same is the view now held in Calcutta and Bombay — *Prannath* v. *Madhu*[12] ; *Nizamuddin* v. *Mumtazuddin*[13] ; *Madan Mohan*

1. (1901) I. L. R. 29 C. 203.
2. (1897) I. L. R. 24 C. 729.
3. (1902) 13 M. L. J. 137.
4. (1907) 17 M. L. J. 287.
5. (1891) 1 M. L. J. 218.
6. (1864) 2 M. H. C. R. 109.
7. 10 B. and s. c. 816.
8. (1893) I. L. R. 17 M. 218.
9. (1889) I. L. R. 12 M. 353.
10. (1878) I. L. R. 2 M. 346
11. (1891) I. L. R. 15 M. 123.
12. (1886) I. L. R. 13 C. 96.
13. (1900) I. L. R. 28 C. 135.

v. *Rajab Ali*[1]; *Vithu* v. *Dhondi.*[2]

Peria Karuppan v. Subramanian.

The Court delivered the following

JUDGMENT :—We think the 3rd defendant as tenant of the plaintiff, the usufructuary mortgagee, was entitled to reasonable notice before ejectment. In the present case the plaintiff gave only 15 days' notice in December in the middle of the cultivation season, which is clearly unreasonable. It was then argued for the respondents, that in this case no notice was necessary, because in his written statement the 3rd defendant had denied the plaintiff's title as landlord, and so forfeited his tenancy. In support of this contention a recent decision—*Abdulla Naha* v. *Moidin Kutti*[3]—was referred to. This decision is not in accordance with *Unhamme Devi* v. *Vaikunta Hegde*[4] where it is said to be settled law that the denial of title for the first time in the suit does not disentitle the tenant to notice for the reason that the plaintiff is bound to show that at the date of suit he had a complete cause of action. We agree with this decision which is in accordance with the view taken in Bombay and Calcutta—*Vithu* v. *Dhondi*; [2] *Prannath Shaha* v. *Madhu Khulu*; [5] *Nizamuddin* v *Mamtazuddin*[6]—and we are unable to follow the decision in *Abdulla Naha* v. *Mohidin Kutti.*[3]

In the result, the decree of the District Judge must be set aside and the decree of the District Munsif must be restored with costs in this and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Wallis.

Mani Bai, an infant by her next friend
Rukmani Bai .. .. Appellant*
v. (*Plaintiff.*)
Lodd Govind Doss .. .. Respondent
(*Defendant.*)

C. P. C., S. 380, *para 2—Security for costs—Minor plaintiff—Practice.*

Mani Bai v. Lodd Govind Doss.

The words "such plaintiff" in the 2nd paragraph of S. 380, C. P. C., cannot be construed as applying to an infant plaintiff's next friend.

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*O. S. No 2 of 1907. 29th November 1907.

1. (1900) I. L. R. 28 C. 223.
2. (1890) I. L. R. 15 B. 407.
3. (1907) 17 M. L. J. 287.
4. (1893) I. L. R. 17 M. 218.
5. (1886) I. L. R. 13 C. 96.
6. (1900) I. L. R. 28 C. 135.

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In the case of infant plaintiffs, unless the circumstances are exceptional, they cannot be required to give security for costs.

Appeal from the order of Mr. Justice Boddam in O. S. No. 188 of 1906.

K. Narayama Rao, *Venkatasubba Rao* and *Radhakrishna Aiya* for appellant.

E. R. Osborne and *Branson and Branson* for respondent.

The Court delivered the following

JUDGMENT :—In this case an order has been made requiring the next friend of a female infant plaintiff to give security for the costs of the suit. It is not contended that the order can be supported unless there is jurisdiction to make the order under S. 380 of the Code of Civil Procedure. We do not think the words "such plaintiff" in the second paragraph of the section can be construed as applying to the infant plaintiff's next friend, and there is no evidence in the present case that the plaintiff does not possess sufficient immoveable property within British India. Assuming, however, that the Court would have jurisdiction to make the order if satisfied that the next friend " did not possess sufficient immoveable property, " we are of opinion that the order should not have been made in the present case. We agree with the decision in *Bai Porebai* v. *Devji Meghji*[1] that in the case of infant plaintiffs, unless the circumstances are exceptional the English practice, under which an infant plaintiff could not be required to give security for costs, should be followed. We do not think the circumstances of the present case are of so exceptional a character as to warrant the making of the order.

We must accordingly set aside the order with costs here and in the Court of first instance.

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1. (1898) I. L. R. 23 B. 100.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller and Mr. Justice Munro.

Sellammal .. 2nd Counter-Petitioner* (2nd Defendant).

v.

Velappa Naicker and others .. Petitioners and 1st Counter-Petitioner (*Plaintiffs and 1st Respt.*)

Sellammall v. Velappa Naicker.

C. P. C., Ss. 561, 590—Memorandum of objections in appeals from orders.

A memorandum of objections will lie in appeals from orders.

Appeal from the order of the District Court of Coimbatore dated 9th April 1907 in Interocutory Application No. 156 of 1907 in O. S. No. 9 of 1907.

C. V. Anantakrishna Aiyar for *P. R. Sundara Aiyar* for appellant.

P. S. Sivaswami Aiyar for respondent.

The Court delivered the following

JUDGMENT :—Having heard arguments on both sides we think that the appellant was not prejudiced by the refusal of the District Judge to accede to her request for adjournment. There is no reason to disturb the order for the appointment of a receiver and we dismiss the appeal No. 177 with costs.

As regards the memorandum of objections we think that S. 590 of the Civil Procedure Code makes applicable the procedure of S 561 to appeals from orders and the memorandum of objections will lie—vide *Kausalia* v. *Gulab Kuar.*[1] Objection is taken to the District Judge's order allowing a maintenance allowance to the appellant. The appellant is not entitled to any allowance for her maintenance and the order must be set aside.

The memorandum of objections is allowed with costs.

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* A. A. O. No. 177 of 1907. 15th November 1907.

1. (1899) I. L. R. 21 A. 297.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis and Mr. Justice Sankaran Nair.

Manuel Louis Kunha .. Appellant* (*Plaintiff*).

v.

Juana Coelho and others .. Respondents (*Defendants* 2 *to* 7).

Manuel Louis Kunha .. Appellant* *Defendant*).

v.

Manuel Souza .. Respondent (*Plaintiff*) .

Louis Kunha v. Coelho. —— Louis Kunha v. Souza.

Will—Bequest with instructions—Instructions not carried out—Trust Act, Ss. 5, 81, 83—S. 5, proviso—Trustee holding for the benefit of the legal representative—Estoppel—Contract—Fraud.

Per *Curiam* :—If any individual on his death bed, or at any other time, is persuaded by his heir at law, or his next of kin, to abstain from making a will, or if the same individual, having made a will, communicates the disposition to the person on the face of the will benefitted by that disposition, but at the same time says to that individual that he has a purpose to answer which he has not expressed in the will, but which he relies on the disponee to carry into effect and the disponee assents to it either expressly or by any mode of action which the disponee knows must give the testator the impression and belief that he fully assents to the request, then the heir at law in the one case, and the disponee in the other will be converted into trustees simply on the ground that an individual shall not be benefitted by his own personal fraud.

The proviso to S. 5 of the Trusts Act makes the English law applicable to India.

Per *Wallis* J. :—The law is the same in India as in England in this matter. S. 81 of the Trusts Act has no application to the matter.

Per *Curiam* :—Where a legatee with secret instructions to carry out some trust claims as universal legatee without disclosing the trust suppressing the instructions given by the testator, with the evident intention of retaining the estate himself, letters of administration cannot be granted to him even on the view that he has some beneficial interest in the estate, as the same will only enable him to commit fraud.

Per *Sankaran Nair* J.—S. 81 of the Trusts Act applies even if the testator intending to dispose of the beneficial interest to others leaves his estate to the devisee. The words "intended to dispose of the beneficial interest therein" in S. 81 have reference to the disposal of the beneficial interest by transfer or will. Differences between the English and the Indian Law pointed out.

In the English Law, evidence is admissible only to prove a trust but not to prove that the legal estate alone passed. In the Indian Law, evidence is admissible to prove that the legal estate alone passed to the person named in the will. In India whenever it can be proved that the devisee was only intended to be a trustee, he holds the property only for the benefit of the testator's legal representative, but in England he holds it for himself except in the case of communication of testator's wishes and consequent fraud on his part, or admission by him on his part that he holds only as a trustee

Obiter :—Under the Indian Trusts Act, the beneficiary has no estate or interest in the subject-matter of the trust. He has only a right to proceed against the trustee.

** A. 72 of 1906 and S. A. 229 of 1906. 28th January 1908

Per *Sankaran Nair* J. (*Wallis* J. *dissentiente*)—S. 187 of the Succession Act is no bar to a suit by a beneficiary against a legatee entitled to letters of administration for enforcement of a trust created by the testator by virtue of some secret instructions not embodied in the will.

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Per *Sankaran Nair* J. —Though the title as an administrator does not vest in the administrator until the grant of the letters, yet when the letters of Administration are granted, they relate back to the testator's death and all acts done by a party who afterwards becomes administrator for the benefit of the estate or to fulfil the wishes of the testator are valid and binding on the estate. An *executor de son tort* or universal legatee cannot plead his omission to take out letters of administration in a suit brought by a beneficiary to enforce the trusts which he is bound to discharge.

Per *Wallis* J. .—A legacy cannot be recovered without administration of the testator's estate, and a suit by a beneficiary for the enforcement of a trust cannot be maintained in the absence of a grant of letters of administration.

Appeal and Second Appeal from the decrees of the District Judge of South Canara in O. S. No. 2 of 1905 and A. S. No. 238 of 1905 respectively.

Both the appeal and the second appeal relate to the same matter, *viz.*, the will of Rev. A. J. Coelho, a Roman Catholic priest. The appeal was against the decree of the District Judge of South Canara dismissing the application of the plaintiff, M. L. Cunha, as universal legatee for letters of administration with the will annexed, which had been registered as a suit on a caveat being entered by the next of kin. The second appeal was against the decree of the same Court allowing the claim of the plaintiff in that suit (respondent in S. A. $\frac{229}{1906}$) for a sum of money which he alleged the testator had directed the defendant (M. L. Cunha, appellant in S. A. $\frac{229}{1906}$) to pay out of the outstandings due to the estate, and which the defendant, subsequent to the testator's death, had also undertaken to pay with interest.

P. R. Sundara Aiyar and *B. Sitarama Rao* for appellant.

K. Narayana Rao for 3rd respondent.

P. R. Sundara Aiyar for appellant:—Before a trust can be fastened upon a legacy, there must be clear proof of an intention to create a trust. Evidence of mere floating intentions will not do. The question is whether on the facts it could be inferred that the testator intended to do a final *juristic* act. There is no proof of any intention to create a trust at the date of the will. His expressed intentions as spoken to by one witness are opposed to the intentions as spoken to by another, and opposed to the actual undisputed dispositions made by the testator himself. The law as

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to secret trusts in England is laid down in *Walgrave* v. *Tebbs*[1]; *McCormic* v. *Grogan*[2]; *Jones* v. *Badley*[3]; *Rowbotham* v. *Dunnett*[4]; *Sidegreaves* v. *Brewer*[5]; *Boyes* v. *Carritt*[6]; *Scott* v. *Pitt-Rivers*[7]; *Withham* v. *Andrew*.[8] Fraud is the basis of the trust. Unless the instructions are communicated and accepted by the legatee as a binding trust, no trust can be engrafted on the legacy (*ib.*) Again this rule as to secret trusts ought not to be applied to India. S. 50 of the Succession Act is imperative as to the mode in which a will is to be executed; S. 57 as to revocation. *Balakishen Das* v. *Legge*[9]; *Kurri Veera Reddi* v. *Kurri Bapi Reddi*[10] deprecate going behind statutes with a view to relieve against fraud—Cf. observations in *Walgrave* v. *Tebbs*.[1] Even supposing there was a valid trust created, some beneficial interest was reserved to the plaintiff; therefore, he is entitled to letters of administration. Letters of administration may be granted to residuary legatees in trust. The Court cannot refuse letters of administration. Cf. S. 85, Probate and Administration Act. If no trust is validly created, the plaintiff takes the beneficial interest—*Walgrave* v. *Tebbs*[1]; *Burney* v. *Macdonald*[11]; *Moss* v. *Cooper*.[12] It is only where the legatee disclaimed all beneficial interest that he has been declared a trustee for the next of kin—*Boyes* v. *Carritt*.[6] Mere declaration of intention by the testator would not cut down the interest of the legatee—*Walgrave* v. *Tebbs*[1]; *Sidegreaves* v. *Brewer*[5]; *Rowbotham* v. *Dunnett*.[4] In fact he is an executor by implication—S. 182 Succession Act—*Hormusji Navroji* v. *Bai Dhanbhaiji*[13]; *Monmohini* v. *Bungachandra*.[14] Then the Court ought to grant letters of administration.

K. Narayana Rao for respondent:—Even if secret trust is not proved or accepted, evidence as to it proves that the testator had no intention to give the legatee a beneficial interest—*Kali Charan Ghosal* v. *Ram Chandra Mandal*.[15] The trustee having disclaimed the trust, letters of administration ought not to be given to him. There is no reason why in India the English law as to secret trusts ought not to apply. See also S. 81 of the Trusts Act.

1. (1855) 2 K. & J. 313; 69 E. R. 800.
2. (1869) L.R. 4 H.L. 82
3. (1868) 3 Ch. Ap. 362.
4. (1878) 8 Ch. D. 430.
5. (1880) 15 Ch. D 594.
6. (1884) 26 Ch. D. 581.
7. (1902) 1 Ch. 403.
8. (1900) 1 Ch. 237.
9. (1899) I. L. R. 22 A. 149 (P. C.)
10. (1906) I. L. R. 29 M. 336. (F.B).
11. (1845) 15 Sim. 6; 60 E. R. 518
12. (1861) 1 J. & H. 352; 70 E. R. 782.
13. (1887) I. L. R. 12 B.164.
14. (1903) I. L. R. 31 C. 357.
15. (1903) I. L. R. 30 C. 783.

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P. R. Sundara Aiyar:—S. 81 has no application at all to cases like this. It applies only to cases where the testator had no intention to give the beneficial interest to the legatee at the time he made the will on the face of it. It does not apply to cases of subsequent declarations of intention *contra*. Again, you can look to attendant circumstances, but not to declarations of intention when that intention is not expressed in the manner required by law or is contrary to the declaration made according to law—S. A. 229 of 1906. S. 187, Indian Succession Act, is a bar to this suit—*Gordhandas* v. *Bai Ramcoover*[1]; *Kumar Chandra Kishore* v. *Prosanna Kumar*.[2] There was no issue besides as to trust. The Judge has treated it as an oral legacy.

K. Narayana Rao:—S. 187 is no bar because the suit is not based on the will. It is based upon the promise. [*Wallis* J. —What is the consideration for the promise ?] It is based upon the trust.

The Court delivered the following

JUDGMENTS :—*Wallis* J :—This is an appeal from the judgment of the District Judge of South Canara dismissing the appellant's petition for grant of letters of administration of the estate of Revd. A. J. Coelho, a Roman Catholic priest, with the will annexed by which the petitioner was made residuary legatee. A caveat was put in by one of the next-of-kin alleging in effect that the testator had bequeathed the estate to the petitioner subject to certain instructions as to how the property should be disposed of and that the petitioner had fraudulently suppressed the private instructions left by the testator in order to claim the estate for himself. The second issue raised was, whether the bequest was really intended for religious and charitable purposes and the fourth, whether the will had become uncertain and incapable of execution by reason of the plaintiff having suppressed the private instructions, if any, given him by the testator. The fifth issue was, whether the will had become null and void on the above grounds and the sixth to what relief is the plaintiff entitled. On these issues the District Judge has found that the will did not really express the intentions of the testator as the plaintiff undertook to dispose of the property in other ways explained to him by the testator. This finding is contested in appeal, but is, in my opinion, borne out by the evidence. The plaintiff was the only witness on his own side and his evidence is unsatisfactory

1 (1901) I. L. R. 26 B. 267. 2. (1906) 10 C. W. N. 864.

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and in some important matters is at variance with the evidence previously given by him in a suit relating to the same matter. On the other hand I see no reason for refusing to accept the evidence given by the two witnesses for the defence, the Revd. M. P. Collaco, another priest, and S B. Mascarenhas who is translator to the District Court and had been educated and started in life by the deceased. According to the last witness the decision of the testator to leave his money to some one with private instructions as to how it was to be disposed of was arrived at after the decision of the High Court against the legality of bequests for Masses. This was *Colgan* v. *Administrator-General of Madras*[1], decided in March 1892. The will in the plaintiff's favour is dated the 8th October 1894 and the testator died on the 7th February 1901 The petition for letters of administration which has become the plaint in this suit was not filed until the 11th October 1904 after a suit had been filed against the plaintiff to compel him to give effect to the alleged secret trusts of the will Although the defence evidence points to the plaintiff having been informed from the first of the intention of the testator in making this will in his favour, yet there is no direct evidence that he was so informed. But assuming that he was not so informed at the time when the will was executed, there is evidence that he was informed subsequently during the lifetime of the testator and that his conduct was such as to lead the testator to believe that he was prepared to carry out the instructions communicated to him by the testator. The Revd. M. P. Collaco who attested the will states that he was aware from the first of the testator's intention that the property should be disposed of according to his instructions, and that in August 1895 when the testator was ill the plaintiff told the witness that the instructions had not been completed—this shows that he was then aware of the testator's intentions—and that the witness in the plaintiff's presence took certain instructions and made a memorandum of them in his note-book, Exhibit *II*, but did nothing further as Mascarenhas, the defence second witness, arrived and the matter was left in his hands. Mascarenhas says that he spoke to the plaintiff about these instructions, that subsequently at the testator's request he took down his instructions in Canarese and communicated them to the plaintiff who was put in possession of the written instructions.

1. (1892) I. L. R. 15 M. 424.

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In this state of the evidence the rule of English Law is clear. To borrow the language of Lord *Westbury* in *McCormic* v. *Grogan*[1]:—"If an individual on his death-bed, or at any other time, is persuaded by his heir-at-law, or his next-of-kin, to abstain from making a will, or if the same individual, having made a will, communicates the disposition to the person on the face of the will benefitted by that disposition, but at the same time says to that individual that he has a purpose to answer which he has not expressed in the will, but which he relies on the disponee to carry into effect and the disponee assents to it either expressly or by any mode of action which the disponee knows must give the testator the impression and belief that he fully assents to the request, then undoubtedly the heir-at-law in the one case and the disponee in the other will be converted into trustees simply on the ground that an individual shall not be benefitted by his own personal fraud." As explained in the same judgment a Court of Equity in order to prevent the Statute of Wills from being made an instrument of fraud does not indeed set aside the statute b t fastens on the individual who gets a title under it and imposes on him a personal obligation because he is seeking to apply the statute as an instrument for accomplishing a fraud. The important question we have to decide is whether this rule of equity is applicable in India. There is no direct authority, and in the only case in which it was raised so far as I know, *Kali Charan Ghosal* v. *Ramchendra Mandal*,[2] it was unnecessary to decide it. It has been contended for the appellant that it is not applicable, and the decisions in *Balkishen Das* v. *W. F Legge*[3] and in *Kurri Veerareddi* v. *Kurri Bapireddi*[4] have been relied on. In the former of these cases it was held by the Privy Council that oral evidence was inadmissible to show that the parties to a deed of sale really intended to create a mortgage, as the case must be governed by S. 92 of the Indian Evidence Act and not by the cases decided by the Courts of Equity in England which have no application to the law of India as laid down in Acts of the Indian Legislature. The law of trusts in India is regulated by the provisions of the Indian Trusts Act, 1882, and the case now before us must, no doubt, be determined with

1. (1869) 4 E. & I. A. p 82 at 97.
2. (1903) I. L. R. 30 C. 783.
3. (1899) I. L. R. 22 A. 149 ; (P. C.)
4. (1906) I.L.R. 29 M. 336(F.B.)

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reference to the provisions of that enactment. On behalf of the respondents who are the next-of-kin it has been argued that the provisions of S. 81 apply. That section provides that when the owner of property transfers or bequeaths it and it cannot be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest, the legatee must hold the property for the benefit of the legal representative of the testator. If this section applied, the Indian legislature would have departed by the English rules of equity and created a resulting trust in the circumstances of the present case instead of enforcing the trusts accepted by the legatee in so far as they are for lawful purposes on the principles explained by Lord *Westbury* in the passage above cited and in numerous other cases. I am, however, of opinion that the present case does not come within the provisions of S. 81, and, on the other hand, I think that elsewhere in the Act we have statutory authority for applying the principles laid down in the English cases. S. 5 which provides that no trust is valid unless declared in the manner therein provided is subject to the proviso that the rules therein contained do not apply where they would operate so as to effectuate a fraud. This is exactly the principle upon which the English cases have been decided and warrants the Courts in this country in imposing upon an heir or a beneficiary under a will who has induced the deceased not to make a will or not to revoke a will already made by assurances that he would carry out the instructions given him in trust for the carrying out of such instructions. Otherwise the provisions of S. 5 would operate so as to effectuate a fraud. That this was intended to be the effect of the proviso is further shown by the fact that in Chapter IX the Act provides for the case in which instructions accepted by the legatee are unlawful and therefore cannot be enforced, but it would be inequitable to allow the legatee to enjoy the beneficial interest by creating in such case a resulting trust in favour of the testator's legal respesentative. See S. 85 which provides that where during the testator's life-time the legatee agrees with him to apply the property for an unlawful purpose the legatee must hold the property for the benefit of the testator's legal representative. The section also provides that where property is bequeathed and the revocation of

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the bequest is prevented by coercion, the legatee must hold the property for the benefit of the testator's legal representative.

It is, in my opinion, obvious that the case of the legatee preventing revocation by undertaking to carry out the lawful instructions of the testator was considered by the framers of the Act to have been dealt with elsewhere in the Act, that is to say, under the proviso to S. 5 which permits of such instructions being enforced as a trust, and as a further application of the same principles I should say that if the testator failed to give any instructions or such instructions could not be ascertained, the beneficiary would be compelled to hold for the benefit of his legal representatives. I may say further that if cases such as the present come within the proviso to S. 5 which embodies the English equitable rule, it follows that they cannot come within S. 81, and even if there were no such proviso, I do not think the language of S. 81 would cover them.

For the appellant it is argued that even on this view of the law he is entitled to administration because the testator's instructions as spoken to by the defence witnesses shew that the testator intended him to benefit to some extent. Even if this is so his conduct in denying the instructions and taking possession of the whole estate for his own benefit has been such as to make it improper to grant him administration, and on this ground, I think, his appeal must be dismissed.

We, of course, decide nothing as to the right of other persons claiming to be entitled to apply for a grant of letters of administration, or as to a suit for administration of the estate by the Court itself. In the result, the appeal is dismissed with costs.

Sankaran Nair J. :—This is an appeal from the decree of the District Judge of South Canara dismissing an application under the Indian Succession Act for letters of administration.

The Rev. A. J. Coelho, Vicar of the Church of Buntwal, by his will, Exhibit *I*, dated the 8th of October 1894, gave all his property, moveable and immoveable, to the petitioner-appellant, Manuel Louis Kunha, Sexton of that Church "to have them, possess and enjoy as his own things.." After the testator's death on the 7th February 1901, Louis Kunha applied, on the 11th October 1904, for letters of administration with the will annexed as the sole legatee under the will, the executors being dead.

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This application was opposed by the brother and nephew of the testator.

They stated by their answer that the testator's desire was to leave the bulk of his property to the Church, but as he feared a will leaving property to the Church for Masses for his soul might be declared invalid, he left all to the plaintiff Louis Kunha, with private instructions giving pecuniary legacies to certain parties and the bulk of the property to the Church.

The Judge has found that there is clear and definite evidence that while the testator intended something for the legatee and certain other persons he intended the bulk for the Church and that these private instructions left by the testator have been suppressed by the appellant. He held accordingly that the will is null and void and incapable of execution and therefore rejected the appellant's claim.

The appellant's pleader contends the evidence does not support the conclusions of the lower Court.

Father Collaco, now Vicar of Cordel Church, formerly Assistant priest at Buntwal under the testator and an attesting witness deposes that the testator was under the impression that a bequest to the Church for saying Masses would be invalid and, therefore, was anxious to leave the property to some person who would carry out his instructions; that the testator even thought of making his will in favour of this witness but abandoned that idea on account of the contingency of his transfer and finally executed the will in favour of the appellant. The witness himself made notes of these instructions which were given some time after, in the presence of the appellant in his diary, a copy of which was forwarded to the Bishop on the testator's death. The second witness, Mascarenhas, translator of the District Court also deposes that he wrote a will for the deceased in Canarese leaving to the Church all his property, and out of the interest thereof Masses were to be said for his own soul, and doubting the legality of that will, after a decision of the Madras High Court, he executed this will in favour of the appellant, leaving private instructions in the handwriting of this witness in Canarese as to how the property was to be disposed of. This paper was with the appellant. These instructions according to the witness were also communicated to the executor, Father Patrao, who was the brother-in-law of this

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witness. I see no reason to distrust the evidence of these witnesses whom the Judge has believed. It is pointed out that the notice of the first witness and the instructions given to the second witness,so far as he is able to remember them,do not agree in many respects, and that the witnesses are interested as valuable property is left to the Church and a darkhast land to the second witness. These reasons are not of sufficient weight for rejecting their evidence. The probability is, as the Judge has pointed out, in favour of its truth. According to this evidence the bulk of the property was left to the Church. What the appellant was to get is not clear. The first witness states it was to be Rs. 500. The second witness states that a thousand rupees and a house and compound were left to him according to the written instructions. The house and compound were afterwards given to the Church, and, in lieu thereof, the legacy to the appellant was increased to two thousand and another thousand was given to his son-in-law.

This is the extent of the appellant's interest in the property of the testator according to the secret instructions which he has suppressed.

By S. 50 of the Indian Succession Act all wills must be signed by the testator or by some person in his presence, and by his direction, and attested by at least two witnesses in the presence of the testator. If any other document then actually written is referred to as expressing any part of the testator's intentions, it may be treated as a part of the will.

It is quite clear, therefore, that these instructions cannnot be treated as a part of the will. There is no trust therefore by a will, nor is there a trust by a non-testamentary instrument, as it is not, and cannot be,contended that these instructions declared any trust so as to place the subject-matter beyond the control of the testator and deprive him of his ownership. Nor can it be successfully contended that these instructions engrafted a trust upon the legal estate already well devised by Exhibit *I* as the will operated only after death and the instructions in writing must have already passed—if they created a trust—the interest intended to be conveyed thereby though not necessarily an immediate interest in possession.

To defeat the appellant's claim under the will, the respondents, however, rely upon the rule of law that the Court will enforce

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a trust when the testator leaves the estate to the devisee on his undertaking to carry out the intentions of the testator and also upon S. 81 of the Trusts Act.

The rule of English law relied upon may be briefly stated thus. If the heir or legal representative of a person competent to make his will undertakes to carry into effect his wishes that may be communicated to him and on the faith of that undertaking that person did not dispose of his property by will, then the Court will compel the heir or legal representative to carry into effect all such instructions that may have been given to him. So again, if a legatee promises the testator that upon the testator's leaving the property to him by a regular will, he will carry out all such wishes as are confided to him by the testator and relying upon that promise the testator makes a will in his favour or if having made a will a person at any time before his death communicates the disposition to the legatee and states to him that he has not expressed in the will all his intentions which he confides to the legatee and that he depends on the legatee to carry them into effect and the legatee either expressly assents to it or by his silence or conduct leads the testator to believe that he will abide by the instructions so communicated to him then the legatee will be treated as a trustee and he will be compelled to carry out the instructions confided to him. The reason is that but for such assent, express or implied, the testator would not probably have left the property to him, or the will, if made, might have been revoked. It would be fraud on his part not to give effect to the testator's intentions, and no man shall be benefited by his own personal fraud, and if the Statute of Frauds or the Statute of Wills gives him the title the Court, fastens upon his conscience a personal obligation to carry into effect the wishes of the testator confided to him—see *Wallgrave* v. *Tebbs* [1]; *Mc Cormick* v. *Grogan* [2] *In re Boyes*: *Boyes* v. *Carrits* [3]; *Jones* v. *Badley*, [4]; *In re Pitt Rivers-Scott* v. *Pitt Rivers* [5]; *In re Maddock*; *Llewelyn* v. *Washington*. [6]

Thus the jurisdiction of the Court is founded upon fraud and the Court interferes to prevent the perpetration of fraud. The property is not affected except by reason of the personal obligation binding on the devisee. If there is no personal obligation or fraud,

1. (1855) 2 K. & J. 318.
2. (1869) 4 L. R. H. L. 82 at 88.
3. (1855) 26 Ch. D. 531.
4. (1868) 3 Ch. p.p. 362.
5. (1902) 1 Ch. 403.
6. (1902) 2 Ch. 220.

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then there is no trust. Therefore "if he renounces, or disclaims, or dies in the lifetime of the testator, the persons claiming under the memorandum can take nothing against the heir-at-law or next-of-kin or residuary devisee or legatee. "—*Cozens Hardy* L. J. in *In re Maddock, Llewelyn* v. *Washington.*[1]

Thus the instructions are not treated or enforced as a part of the will. The instructions after acceptance create an obligation on the devisee and confer title on the beneficiaries *dehors* the will. Lord *Westbury* said in *Cullen* v. *Attorney-General for Ireland* : [2] " Where there is a secret trust or where there is a trust created by a personal confidence reposed by a testator in any individual, the breach of which confidence would amount to a fraud, the title of the party claiming under the secret trust or claiming by virtue of that personal confidence, is a title *dehors* the will, and which cannot be correctly termed testamentary." See also *In re Maddock. Llewellyn* v. *Washington.*[1] For this reason a test is pointed out by Lord *Cairns* in *Jones* v *Badley*[3] to consider the case as unaffected by the Statute of Wills. Thus the trust, if any, in the case before us not being created by any instrument of a testamentary character is unaffected by the provisions of the Indian Succession Act.

In England S. 7 of the Statute of Frauds declares that a trust must be proved by a will or be manifested and proved by some writing signed by the author of the trust or else the trust shall be void. Resulting and constructive trusts are exempted from the operation of this section by S. 8. The trust in question is not proved by a will or writing signed as required. But the English Judges got out of the difficulty by deciding that even an Act of Parliament shall not be used as an instrument of fraud. This is undoubtedly taking a bold step to compel justice to be done, and though it is a sound rule of law that when a statute is enacted to prevent fraud it shall not be used to cover the perpetration of fraud, unless by express words or necessary implication the Courts are restrained from interference, it can hardly be doubted that if this doctrine had not been already enforced in a long and uniform course of decisions it is not likely that it would now be accepted and enforced in courts of law.

1. (1902) 2 Ch. 220. 2. (1866) 1. H. L. at p. 198.
3. (1885) 2 K. and J. 813.

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Has the principle then been accepted in India, or are we now to apply it in the case before us?

The trust, if any, in such cases is treated as an exception to the rule that parol trusts cannot be declared upon an estate devised by a will, and is not a resulting or constructive trust in English law. So we may disregard for the present Chapter IX of the Trusts Act which deals with such trusts. The definition of the word 'trust' also excludes such trusts. But such definition, in my opinion, clearly includes this case. The obligation arises out of a confidence reposed in and accepted by the appellant, the owner of the property, for the benefit of himself partly and of the persons to whom he has undertaken to deliver certain properties or pay various sums of money.

S. 5 of the Trusts Act, corresponding to S. 7 of the Statute of Frauds, similarly enacts that no trust in relation to immoveable property is valid unless declared by a will or in writing signed by the author of the trust. The same rule applies to moveable property unless the ownership is transferred to the trustee. The exception (S. 8 of the Statute of Frauds) in favour of resulting and constructive frauds is unnecessary in the Indian Act as the definition of the word 'trust' excludes them and they are fully dealt with separately in Chapter IX. It will be noticed that trusts in cases of fraud, as the one before us, are not in terms exempted from the operation of the seventh section though the English Courts, as I have already stated, treat them as an exception. But in the Indian Trusts Act there is a proviso to S. 5 to the effect that these rules as to the validity of a trust "do not apply where they would operate so as to effectuate a fraud." This is the ground on which English Courts have introduced the exception and created by reason of the devisee's fraud what was a purely moral into a legal obligation. This proviso, therefore, to my mind places it beyond doubt that the Indian Legislature deliberately adopted the rule laid down by English decisions. Mr. Whitley Stokes who drew the bill which became the Trust Act is of the same opinion. In his "Anglo-Indian Codes" he states "these rules do not apply where they would operate so as to effectuate a fraud, as, for example, where a father having power to bequeath certain land is induced not to make a will of that land by the promise of his heir-presumptive

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that he will provide thereout for his relatives " and cites *Sellack* v. *Harris* [1] and other cases cited by Lewin, 8th Edition, page 6 which declare the English law as above explained or in other words, the proviso was intended to preserve the rule of English law. The provisions of the Statute of Frauds as to trust were in force in the Presidency towns and there can be little doubt that the decisions of the English Courts on those sections must have been followed by the Indian Courts, and when they were repealed by the Indian Trust Act there would have been some indication in the Act to alter the law as then understood if that had been the intention, but we find words which, to my mind, are clear the other way and certainly do not favour the inference of any departure from the law as then understood. A careful consideration of the various sections in Chapter IX of the Act, as will be shown when I consider the operation of S. 81 of the Act also strongly confirms this view. Any change in that direction is unlikely as the Indian Courts are Courts of equity and good conscience. Under the Indian Trusts Act the beneficiary has no estate or interest in the subject-matter of the trust. He has only a right to proceed against the trustee and the parties are more easily brought, therefore, under the jurisdiction of an Equity Court.

I have discussed the question at some length on account of the hesitation expressed by the learned Judges of the High Court in *Kali Charan Ghosal* v. *Ram Chendra Mandal*[2], and I have no hesitation in coming to the conclusion that the law in India in this respect is the same as in England and that trusts as proved by the oral evidence are valid. The appellant is, therefore, only a trustee for the persons named by the testator as beneficiaries.

If I am right in this view, then S. 81 of the Trusts Act which relates to resulting trusts and gives the property to the heir of the testator has obviously no application. But if such is not the law in India, or if fraud is not proved so as to bring the case within that rule, the question arises whether the appellant is entitled to keep the property or he is only a trustee for the testator's legal representatives. Where the will declares the trust, where it is lawful (S. 85) the law is clear. Where the will itself shows that the devisee is only a trustee though there is no beneficial

1. 5 Vin. Abr. 521

2. (1903) I. L. R. 30 C. 783.

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interest created by the will it is a case of resulting trust (S. 83.) Does it make any difference then that it is by extrinsic evidence that it is proved that the devisee is only intended to be a trustee and no beneficial interest is created by the will when such extrinsic evidence is permitted by law? S. 81 of the Trusts Act runs thus.—"Where the owner of the property transfers or bequeaths it and it cannot be inferred consistently with the attendant circumstances that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for the benefit of the owner or legal representative." This clearly permits proof of the attendant circumstances to show that the testator did not intend to dispose of the beneficial interest, going further, I think, than the English law which allows only evidence of the *trust* to be given when the gift is made in absolute terms or when the will may even state that the gift is not by way of *trust*. But once the evidence is admitted and it is proved that the devisee is only a trustee the law seems to be clear. The general rule is that when a transferee or devisee has only the legal estate and is made out only to be a trustee he takes no beneficial interest in the property. The Lord Chancellor after finding that the bequest in the case before him was one on trust said in *Briggs* v. *Penny*[1] :—"If so, that is sufficient to exclude Miss Penny from taking the beneficial interest. Such views and wishes may be left unexplained, such trust be left undeclared, but still in such case it is clear a trust was intended and that is sufficient to exclude the legatee from a beneficial interest. Once establish that a trust was intended, and the legatee cannot take beneficially. If a testator gives upon trust, though he never adds a syllable to denote the objects of that trust, or though he declares the trust in such a way as not to exhaust the property or though he declares it imperfectly or though the trusts are illegal, still in all these cases, as is well known, the legatee is excluded and the next-of-kin take."—*Briggs* v. *Penny.*[1]

Similarly, under Act II of 1882 where there is a valid bequest to any person of the beneficial interest the trustee of course holds it for his benefit, or where any property is bequeathed upon trust and no trust is declared or the trust is incapable of execution or executed without exhausting trust property (S. 83) or where it is for an illegal purpose or there is an agreement to apply it to an

1. (1851) 3 Mac. and G. 557.

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unlawful purpose (S. 85) or where the revocation of the bequest is prevented by coercion the devisee must hold it in trust for the benefit of the testator's legal representatives. The omission of the case of the testator not revoking his will on account of fraud is only due to the fact, that it has been already provided for, as I have pointed out by S. 50. It would be in harmony with these provisions to hold that where the testator intends only the legal estate to be conveyed to the devisee though such intention is not expressd therein, then under S. 81 he takes no beneficial interest therein. According to the illustration to S. 83, the will itself must show that the devisee is only a trustee; S.81 applies where the attendant circumstances prove it.

But it is suggested that S. 81 does not apply where it is the intention of the testator to pass the beneficial interest in the property to certain other persons though not by the transfer or devise in question. If the testator has in law disposed of the beneficial interest, if the transferee is only a benamidar, then no question arises, as the appellant would be a trustee for that beneficiary. Even if the testator intending to dispose of the beneficial interest to others leaves his estate to the devisee, I am of opinion that the section applies. As pointed out by Mr. Whitley Stokes in his notes to these sections they are generally intended to reproduce the English law except in one instance, see S. 83 illustration (*c*). The illustrations even are taken from the decided cases given in Lewin on Trusts. The rule of English Law is quite clear. The only question to be considered is "whether the grantee, devisee or legatee was intended to take the legal estate merely." See Lewin Chapter IX, S. I, § I, p. 150. The judgment of the Lord Chancellor, already referred to, also makes it clear. It seems also reasonable. When we have to consider the rights of a transferee or devisee, the question is what are the rights conveyed to him, and the fact that certain rights are intended by the transferor to be conveyed to other persons is only useful to show his intention not to convey such rights under this transfer. The grantor's intention to convey the beneficial interest subsequently to somebody else cannot avail the appellant.

In one respect this is, undoubtedly, a departure from the English law. As I have already stated, where secret instructions are left by the testator *without* being communicated to the devisee in

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circumstances that would raise a presumption of fraud then according to English law the devisee takes it absolutely, whereas if my construction of the section is right, the legal representative would take it. But this argument loses much of its force when we consider that when such instructions simply shows that the testator gave the devisee the legal estate only and not the beneficial interest without showing anything else, then this section clearly gives the estate to the legal representative though the English law in that case also would give it to the devisee. A deviation from that law was made when the section admitted proof of the attendant circumstances and placed a bequest on the same footing as a transfer, where it will be presumed in some cases, say in the absence of consideration, that the transferee held in trust for the transferor. It has also to be noticed that the appellant's case involves a wide departure from the English law when communication of the testator's wishes to the devisee and consequent fraud on his part is proved. Even according to that law where the devisee admits that he is only a trustee though the will is absolute in its terms and it clearly appears that the testator's intention was to dispose of the beneficial interst in favour of certain persons which intention could not be carried into effect on account of the failure of the testator to communicate it in his lifetime to the devisee, it has been held that there is a resulting trust and the next-of-kin, not the devisee, takes the estate. Thus in *In re Boys, Boyes* v. *Carrit*[1] the testator as here left the entire property by his will to Carrit but it appeared clearly from the evidence that he was to have only the legal estate and the testator intended to dispose of the beneficial interest in favour of a certain lady and child. That trust failed, but as Carrit admitted that he was only a trustee he was held to be a trustee for the next-of-kin of the testator and not entitled to take the property himself. This appears to me to be precisely the effect of S. 81. The only difference is as to the mode of proof. What in England can be proved only by the admission of the party is allowed to be proved by this section by other evidence. In England, as already stated, evidence appears to be admissible only to prove a trust but not to prove that the legal estate alone passed, though the law recognizes the principle that where the legal estate alone passes the devisee, as already stated, must hold only as trustee.

1. (1884) 26 Ch. D. 531.

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In principle it seems difficult to find any reason for giving the property absolutely to the devisee who was really intended only to be a trustee and not to the legal representative of the testator. The danger in allowing extrinsic evidence cannot be a reason, as it is admitted that S. 81 clearly permits it for certain purposes. Nor is this a revocation of the will any more than it is in the case of the other resulting or constructive trusts. The will is good and vests the legal estate in the devisee.

I am, therefore, of opinion that the words "intended to dispose of the beneficial interest therein" in S. 81 have reference to the disposal of the beneficial interest by the transfer or will. For these reasons I hold that the appellant is only a trustee for the legal representatives if there are no trusts to be executed or for the beneficiaries if there are trusts.

Further I agree with *Cozens Hardy* L. J. in *In re Maddock, Llewellyn* v. *Washington*[1] in holding that the case is one of contract and estoppel The appellant agreed for consideration with the deceased to dispose of the properties according to his wishes communicated to him, and the representatives of the deceased, who are respondents before us, are entitled to contend that the plaintiff should be given possession of the estate only on his undertaking to carry out its terms and that he is estopped from claiming the estate unconditionally as the testator abstained from revoking his will by his representation.

The appellant has, therefore, not proved his right to administration as universal legatee. In appeal it is contended before us that as a trustee or as legatee, having a beneficial interest though not to the extent claimed, letters of administration ought to be granted to him. If he had claimed in that capacity and disclosed the trusts he might have been entitled to it. But when he claims as universal legatee, and suppresses the secret instructions given by the testator without stating what they are, with the evident intention of retaining the estate himself, it is clear that the letters of administration would enable him to commit fraud and ought not therefore to be granted. The case is entirely different where the will itself declares the trust, or where on the face of the will it is apparent that the appellant is only a trustee For these reasons, I would dismiss the appeal with costs.

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1. (1902) 2 Ch. 220.

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Judgment in S. A. 229 of 1906.

Wallis J :—It follows from our decision in A. S. No. 72 of 1906 that the plaintiff in this case can only be entitled to succeed by virtue of a trust imposed upon the defendant as legatee under the will by reason of his having undertaken to carry out the testator's instructions in the plaintiff's favour, and so induced him not to alter his will. The plaintff therefore claims through the defendant, the legatee named in the will, but under S. 187 of the Indian Succession Act no right as legatee can be established without a grant of probate or letters of administration. So in England a legacy cannot be recovered without administration of the testator's estate, and there cannot be adminisration without a personal representative before the Court—*Rowsell* v. *Morris*[1]. There has been no grant of probate or letters of administration in this case and, in my opinion, the plaintiff's suit therefore fails. The appeal, in my opinion, should be allowed, the decree reversed and the suit dismissed with costs throughout. As my learned brother differs, the appeal must be dismissed with costs.

Sankaran Nair J:—For the reasons above given, I would dismiss this second appeal also with costs.

The plaintiff is one of the persons to whom, Louis Kunha, who is the defendant, appellant in this appeal has been directed by the instructions given to him by the deceased to pay a certain sum of money for which he has now been sued. It is found by the lower Courts that the appellant has been paying interest to the plaintiff for the amount that has to be paid to him.

I am unable to accept the contention urged on behalf of the appellant that S. 187 of the Indian Succesion Act is a bar to the claim. The suit is not brought to establish the plaintiff's claim as legatee. The legacy, *i. e.*, the entire property of the deceased vested in the defendant on the death of the testator, Ss. 91-106. The law, I have already held, makes him a trustee to carry out the instructions he has received. The suit is therefore by a beneficiary to enforce the trust so far as he is concerned. Nor does he seek to establish 'any right' of the defendant under S. 187. A suit to enforce the defendant's obligation or liability can

1. (1873) L. R. 17 Eq. 20

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scarcely be called an attempt to establish the defendant's "right." As universal legatee the defendant will get letters of administration when he discloses the trusts and undertakes to carry out the terms of the trust, and he cannot be allowed to set up his own fraud in not taking out letters of administration to defeat the claims of the beneficiaries. It is true no right of action accrues to the defendant until he has obtained letters of administration— S. 187. But though his title does not come into existence until the grant of administration, when granted, it relates back to the time of the death of the testator and it is only the intermediate acts "tending to the diminution or damage of the intestate" that are not binding. Where the act is done by a party who afterwards becomes administrator for the benefit of the estate or to fulfil the wishes of the testator, the relation back subsists and the act is valid.

Futher the defendant is in possession of the substantial portion, if not the entire property of the testator. He is clearly an executor *de son tort* (S. 265) and as he is both an executor *de son tort* and the universal legatee, he has all the liabilities that belong to the character of executor and universal legatee in this case and cannot therefore plead that he has not obtained letters of administration.

As neither the plaintiff nor any other beneficiary is entitled to obtain letters of administration and no other person is interested in administering the estate and carrying out the trusts, it would seem, if this suit is dismissed, that the beneficiaries have rights without any remedy.

In the case of this plaintiff, an additional ground is urged that there is a contract between the parties. But it is then necessary to consider whether a request will be implied in fact or in law on the part of the defendant to make the bequest of the legal estate or the pecuniary legacy by the testator to him a consideration under the Indian Contract Act for the promise made by the defendant to the plaintiff. It is unnecessary to consider this in the view I take of the other questions.

I would dismiss the second appeal with costs.

This second appeal is dismissed under S. 575 of the Civil Procedure Code, with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present : Sir Charles Arnold White, *Kt*, Chief Justice, and Mr. Justice Miller.

Rama Odayan & others .. Appellants* (*Defendants.*)

v.

Subramania Aiyar .. Respondent (*Plaintiff.*)

Rama Odayan v. Subramania Aiyar.

Torts—Obstruction of water supply—Ryotwari landholder—Government and Ryotwari landholders, relation between—Damage—Proof—Onus—Right of suit—Tort—Violation of legal right

A violation of a legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognised by law, if there be no sufficient justification for the interference. [*Quinn* v. *Leatham*[1] followed.]

An interference by defendants (land-holders) with plaintiff's right as ryotwari landholder to the supply of water from a Government channel for the irrigation of his lands gives rise to a cause of action against the defendants—whether the plaintiff's right be contractual or proprietary ; and the plaintiff is entitled to an injunction irrespective of the question of damage if the interference amounted to a total deprivation to the plaintiff of his water supply.

Per *Chief Justice* :—*Semble* :—Damage may have to be proved if the result of the obstruction had been merely to diminish the supply of water to plaintiff.

Semble :—It may well be that if Government had blocked up the channel, the plaintiff would have no cause of action against them if the Government had made other provision to supply the plaintiff with water sufficient to meet his accustomed requirements.

Even if damage is not to be presumed, in this case the onus is on the defendants who wrongfully interfere with the plaintiff's right to prove that there was no damage.

Per *Miller* J:—Though there must be some damage to support an action for the infringement of the plaintiff's right, it is enough to show that the act complained of was done in such a way as to be likely to damage the plaintiff, though proof of specific damage be not given. If the effect of the defendants' act was to drive the plaintiff to seek a precarious water supply, dependent on the good will of others, the Court will be justified in inferring damage.

Second Appeal from the decree of the District Court of Tanjore in A. S. No 448 of 1904, presented against the decree of the Court of the District Munsif of Mayavaram in O. S. No. 355 of 1902.

T. V. Seshagiri Aiyar and *R. Kuppuswami Aiyar* for appellants.

The Acting Advocate-General, (*P. S. Sivaswami Aiyar*), *V. Krishnaswami Aiyar* and *T. S. Rajagopala Aiyar* for respondent.

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* S. A. 319 of 1905. 23rd January 1908.

1. (1901) A. C. 495.

Rama Odayan v. Subramania Aiyar. Chief Justice.

The Court delivered the following

JUDGMENTS :—*The Chief Justice*:—The facts of this case, as admitted or found, are stated in the judgment of my learned brother, which I have had the advantage of reading.

It seems to me that whether we regard the relations between the plaintiff and Government, with reference to the supply of water as contractual, the view taken in *Chinnappa Mudaliar* v. *Sikka Naikan*,[1] or whether we regard the plaintiff's right to the water of the channel as a proprietary right appurtenant to the ownership of the land—in either view, I think the injunction which has been granted can be sustained without any express finding that actual damage has been suffered by the plaintiff.

Assuming the rights of the plaintiff as against the Government to be contractual, I do not think it is necessary in order to uphold the injunction which has been granted to pray in aid the principle of the decisions in *Temperton* v. *Russell*[2] and *Quinn* v. *Leatham.*[3] In fact, I doubt whether the principle of these decisions has any application to the present case. This is not a case of inducing a man to break his contract with a third party. No question of combination —the fact there are more defendants than one does not show combination—or of conspiracy to injure arises. If an act has been done by the defendants, which deprives the plaintiff of the enjoyment of a contractual right—assuming the right to be contractual-I think, subject to the question of damage to the plaintiff, which I will deal with later, the plaintiff has a right of action against the defendants.

In his judgment in *Quinn* v. *Leatham*[3] Lord *Macnaghten*, in discussing *Lumley* v. *Gye*[4] said (page 510). "Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of a legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law if there be no. sufficient justification for the interference." I take it, Lord *Macnaghten* assumed that the violation of the legal right caused damage to the party whose right had been violated.

1. (1900) I. L. R. 24 M. 36.
2. (1893) I. Q. B, 715.
3. (1901) A. C., 495.
4. (1853) 2. E. & B., 216.

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The question of course remains, assuming the plaintiff's rights as against Government to be contractual what is the contract? The contract, if any, is a contract on the part of Government to continue such supply as is sufficient for the accustomed requirements of the ryotwari land-holder (see *Sankaravadivelu Pillai* v. *Secretary of State for India In Council*[1]). It may well be that if Government had blocked up the channel in question the plaintiff would have no cause of action against them if they could show that they had made other provision to supply him with water sufficient to meet his accustomed requirements. But I do not think this defence is open to the defendants. Even if it were, they have not attempted to set it up. They have not sought to justify their act on any ground of law in the view that the channel which they blocked up was the channel which had been irrigating the plaintiff's lands. The case was fought in the lower Courts solely on the question whether the plaintiff's lands had in fact been irrigated by the channel which the defendants blocked up.

I think the defendants' act was in violation of the plaintiff's right, and applying the law as enunciated by Lord *Macnaghten* in the passage I have cited I think the plaintiff has a right of action against the defendants, if, as the result of their act, he has sustained damage. It is true there is no express finding as to damage and though there is a general allegation of injury, no damages are claimed in the suit. But I think the plaintiff is entitled to the injunction without any express finding as to damage. It might have been otherwise if the result of the defendants' act had merely been to diminish the supply of water which the plaintiff had been accustomed to receive. But here the channel has been blocked at its source, and as the result of the defendants' act the plaintiff has been deprived of the supply of all the water which he has been accustomed to receive by means of this channel. Even if, in such a case, damage is not to be presumed, seeing that the defendants have violated what is, against them, at any rate a *prima facie* right in the plaintiff, I think it was for them to show that no damage was sustained by the plaintiff, and they have not attempted to do this.

In the view that the plaintiff had a proprietary right in the water of the channel in question as appurtenant to the ownership

1. (1904) I. L. R. 28 M. 72 at p. 74.

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of the land it could not be contended that the act of the defendants did not amount to an infringement of that right. In this view also, I think, the plaintiff, for the reasons I have stated, is entitled to an injunction without an express finding as to damage.

I think the injunction was rightly granted and I would dismiss this second appeal with costs.

Miller J. :—The material facts of the case as presented to us and as found by the District Judge are the following :—The defendants, mirasidars of Perambur village, irrigate the lands of that village which are classed as "wet", from the Perambur channel, an irrigation channel constructed before the paimash by the Government of the day for the purpose of conducting water to the village of Perambur. The plaintiff is a ryot of Edakudi, holding land near the Perambur channel at a point above the Perambur village. The District Judge finds, as a fact, and we accept the finding, that this land is watered from a small channel, the Kandiamadai Kanni which was in existence at the paimash, and is led from the southern bank of the Perambur channel. We must, on these facts, take it that the plaintiff's irrigation of his land for at least 60 years from the Perambur channel without interference by the Government is proved. The defendants blocked up the entrance of the Kandiamadai Kanni by an obstruction placed in the bank of the Perambur channel and so deprived the plaintiff of the use of the water of that channel. The District Judge has restrained them by injunction from repeating the obstruction.

It does not seem that any question was argued in the lower Court as to the right of the plaintiff to obtain a decree if the facts are found as they have been found. The controversy was as to the existence or non-existence of the Kandiamadai channel as a paimash channel, and it seems to have been assumed, in spite of the second issue, that the plaintiff would be entitled to a decree if the existence of the channel were established.

Here it is contended for the appellants that even on the facts found the plaintiff is not entitled to a decree; the argument is that the supply of water for irrigation is made by the Government to the ryot on the footing of contract and if the defendants obstruct the plaintiff's supply they can be made liable, if at all, only

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on proof of actual damage (of which, it is contended, there is here no proof) as for procuring a breach of contract. For the plaintiff, on the other hand, it is argued that his right to the water of the channel is a right of property appurtenant to his occupation of his land, and that any interference with it by the defendants renders them liable to be restrained by injunction. Mr. *Seshagiri Aiyar* did not suggest that we ought not to apply to India the principles of law (apart from any question of conspiracy) enunciated by the House of Lords in *Quinn* v. *Leathem*[1] and by the decisions in other cases in England ; and if we do so, and I know no reason why we should not do so, there is no doubt that in the present case the plaintiff has a cause of action if he has been injured by the act of the defendants. If their act has injured him, the defendants have injured him without just cause or excuse ; for they have not suggested any justification ; they contented themselves with denying the existence of the channel and consequently any obstruction by themselves ; and the act by which the injury has been inflicted is without doubt a wrongful act, the blocking up of a channel which the defendants had no right to block up and which the plaintiff had by his contract with the Government—that is the assumption—a right to have kept open. This was practically conceded by Mr. *Seshagiri Aiyar* and the question is therefore simply whether the plaintiff has shown that he has suffered any injury. The Advocate-General pointed to evidence which, if believed, might prove damage, but what is found by the lower appellate Court is that the whole Kandiamadai Kanni was blocked up, and that if while the channel was so blocked the plaintiff was able to obtain water from the Edakudi channel that was by leave and license of the Edakudi mirasidars, who might at any time revoke the license and leave the plaintiff without water. This finding is arrived at in the course of a discussion of the District Munsif's finding that the plaintiff customarily watered his crops from Edakudi channel, and not on a consideration of any question of damage, for no issue was framed upon that question, nor does it seem to have been presented to the Court in argument. Damage generally was alleged in the plaint (paragraph 9) though not estimated in money, and was denied in the defendant's written statement, but no decision has been given on the question.

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1. (1901) A. C. 495.

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Miller, J.

If damage is proved the injunction granted by the District Judge may be sustained as the appropriate remedy to prevent the repetition of the injury. It was the remedy adopted in *Ramachandra* v. *Narayanasami.*[1] I have had some doubt whether we can decide this question of damage or no damage without obtaining a further finding from the District Judge, but having had an opportunity of reading the judgment just delivered by the learned Chief Justice, I am able to agree with him that it will not be necessary to send back the case. The whole of the plaintiff's water-supply being cut off by the defendants, it seems to follow, as a matter of necessary inference, that the plaintiff must have been damaged: if he had to be at the trouble of providing himself with a new source of supply, that is damage, or at any rate ought to be so considered, unless the defendants can show that it was not. Such damage may not be easily estimated in money, but it is actual damage none the less. I may refer to the cases of *Exchange Telegraph Company* v. *Gregory & Co.*[2] in which three injunctions were granted, of which one restrained the defendant from "continuing to induce any subscriber of the plaintiffs to supply the defendant with the said information (the information was information supplied by the Stock Exchange Committee to the plaintiffs and by them to their subscribers) in breach of his contract with the plaintiffs" In considering the propriety of this injunction Lord *Esher* M. R. made the following observation :—"It is said that plaintiffs have not been injured ; but what the defendant has done must have injured them * * * Though I think there must be some damage to support an action for the infringement of the plaintiffs' common law right, it is enough to show that the act complained of was done in such a way as to be likely to damage the plaintiffs, though proof of specific damage be not given ;" and *Kay* L. J. says : "I agree that the gist of the action would be damage ; but if a judge or jury could properly infer from the acts complained of that those acts must result in damage to the plaintiffs, that is enough."

In the present case, on the finding that the effect of the defendants' act was to drive the plaintiff to seek a precarious water-supply, dependent on the good will of the Edakudi mirasidars, we ought to hold that that act must have damaged the plaintiff.

1. (1892) I. L. R. 16 M. 333. 2. (1896) 1 Q. B 147.

I concur, therefore, in dismissing the second appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

In re a Pleader.

Present:— Sir Arnold White, *Kt.*, Chief Justice, and Mr. Justice Miller.

In re a Pleader .. *Petitioner.**

Legal Practitioners Act, S. 14—Professional misconduct—Transfer of the case to the Court to which the presiding officer was transferred, bad—Jurisdiction to issue warrant or summons on failure of pleader to appear—Use of bad language to Court by a pleader suitor—No professional misconduct.

A charge under S. 14 of the Legal Practitioners Act must be dealt with by the presiding officer of the Court wherein the charge is made and there is no provision of law authorizing the transfer of the case to the file of the Court to which the officer who presided over the Court in which the charge was originally made has been transferred subsequently. It is not competent to a subordinate Court charging a pleader with professional misconduct under S. 14 of the Legal Practitioners Act to issue either a summons or a warrant against the pleader, if he fails to appear in answer to a charge under the section. The penalty for non-appearance in answer to the charge is that a report may be made without the pleader being heard in his own defence.

The use of language by a pleader, such as, that the magistrate had acted "maliciously, vexatiously and with a vindictive spirit" in a written statement attached to a warrant issued against himself, though improper to the last degree, does not amount to "fraudulent or grossly improper conduct in the discharge of his professional duty," the same being used only in the pleader's capacity as suitor and not as a pleader.

Application to annul the charges framed against the petitioner under S. 14 of the Legal Practitioners Act or to set aside the order of the District Magistrate of Tanjore dated in D. Dis. No. 832/M. of 1907 transferring the case from the file of the Sub-Division Magistrate of Tanjore to that of the Sub-Division Magistrate of Kumbaconum and to transfer the case against the petitioner from the file of the Sub-Division Magistrate, Kumbaconum, to that of any other Court of competent jurisdiction, if an enquiry into the charges be deemed desirable or expedient.

T. Subramania Aiyar for the petitioner.

The Public Prosecutor (E. B. Powell) contra.

The Court delivered the following

JUDGMENT:— In this case two charges have been preferred against a Pleader under S. 14 of the Legal Practitioners Act.

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*Cr. M. P. No. 271 of 1907. 13th December 1907.

In re a Pleader.

The first charge alleged professional misconduct against him in connection with the alteration of the date in a certain petition which was presented to the Sub-Magistrate of Tiruvadi and which came before Mr. Jackson on appeal when he was the Joint Magistrate of the Tanjore Division. Before the date named in the charge as the day on which the charge would be taken into consideration, Mr. Jackson ceased to be the Joint Magistrate of the Tanjore Division and became the Joint Magistrate of the Kumbaconam Division.

The District Magistrate made an order transferring the charge to the Joint Magistrate of the Kumbaconam Division on the ground that he had dealt with the matter in the first instance.

S. 14 of the Legal Practitioners Act provides that, if any Pleader practising in any Subordinate Court is charged in such Court with professional misconduct, the presiding officer shall send him a copy of the charge and a notice that, on a day named, the charge will be taken into consideration. It further provides that on that day the presiding officer shall receive and record all evidence produced in support of the charge, and if he finds the charge established, shall report to the High Court. We think that under the section the charge must be dealt with by the presiding officer of the Court in which the pleader was charged. Mr. Jackson is no longer the presiding officer of that Court, and there is no provision of law under which the case can now be transferred to him by the District Magistrate. We must accordingly set aside the order of transfer and direct that this charge be dealt with by the presiding officer of the Sub-Divisional Magistrate's Court at Tanjore.

The second charge against the pleader, with regard to which the facts are not in dispute, was in connection with a written statement attached to a warrant which had been issued by Mr. Jackson as Joint Magistrate of Kumbaconum for the arrest of the pleader. The statement alleged that Mr. Jackson in issuing the warrant had acted " maliciously, vexatiously, and with a vindictive spirit " against the pleader.

The warrant was issued after the pleader had failed to appear to a summons which had been previously issued with reference to the first charge. The Public Prosecutor has been unable to call our attention to any provision of law, and we know of none, which

In re a Pleader.

would authorize the issue of either a summons or a warrant against a pleader who fails to appear in answer to a charge preferred against him under S. 14 of the Legal Practitioners Act. Under the Act, if the presiding officer finds the charge proved he reports to the High Court and the penalty to which the pleader is subject is that provided by the Act, *viz.*, suspension or dismissal by the High Court. The penalty for not appearing in answer to the charge is that a report may be made without the pleader being heard in his own defence.

As regards the question whether the use of the language to which we have referred amounts to 'fraudulent or grossly improper conduct in the discharge of his professional duty,' we are of opinion that it does not. The language was no doubt to the last degree improper, but when the pleader used it he was not discharging his professional duty. He used it not in his capacity as a pleader, but as a party against whom a warrant had been issued.

In *In re Wallace*,[1] the Privy Council held that the writing of a letter to a Judge by a Barrister and Attorney which, having regard to the terms of the letter, amounted to contempt of Court, was not "professional misconduct," since the letter was written in the Attorney's capacity as a suitor in respect to a supposed grievance as a suitor and having no connection with his professional character or anything done by him professionally. The principle of this decision of the Privy Council was acted on by this Court in *In The Matter of A First Grade Pleader.*[2]

As, in our opinion, the admitted facts on which the second charge was based do not constitute "grossly improper conduct in discharge of professional duty" within the meaning of the section, we must annul the charge.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Miller.

Subramanya Tevan and others .. Appellants* (*Defendants* 1 *to* 7.)
v.
Arunachala Tevan and another .. Respondents (*Plaintiff and* 8*th Defendant.*)

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* S. A. 318 of 1905. 11th December 1907

1. (1866) L. R. 1. P. C. 283.

2. (1900) I. L. R. 24 M. 17.

Subramanya Tevan v. Arunachala Tevan.

Pronote—Right of Suit—Payee impleaded as defendant.

A person other than the payee of a pronote has no right of suit thereon, whether the pronote is one negotiable or non-negotiable. The fact that the payee is impleaded as defendant cannot alter the principle.

[*Ramanuja Ayyangar* v. *Sadagopa Ayyangar* [1] and *Subba Narayana Vathiyar* v. *Ramaswami Aiyar* [2] followed.]

Second Appeal from the decree of the Subordinate Judge's Court of Tuticorin in A. S. No. 154 of 1904 presented against the decree of the Court of the District Munsif of Srivilliputtur in O. S. No. 489 of 1903.

T. *Natesa Aiyar* for appellants.

G. *Krishnaswami Aiyar* for respondents

The Court delivered the following

JUDGMENT:—In *Ramanuja Ayyangar* v. *Sadagopa Ayyangar* [1] it was held that under the Negotiable Instruments Act the only person entitled to sue on a promissory note was the payee or the holder. The decision in this case was expressly approved by the Full Bench in *Subba Narayana Vathiyar* v. *Ramaswami Aiyar*. [2] The attention of the lower appellate Court was not called to *Ramanuja Ayyangar* v. *Sadagopa Ayyangar*. [1] On the authority of this case, we must hold that the plaintiff, not being the payee named in the note, was not entitled to sue.

The note sued on in the present case is not a negotiable instrument under the definition contained in S. 13 of the Negotiable Instruments Act, whereas it would appear that the note sued on in *Ramanuja Aiyyangar* v. *Sadagopa Ayyangar* [1] was a negotiable instrument. But the fact that the instrument is not negotiable, in our view, makes no difference as regards the question before us. S. 78 draws no distinction between negotiable and non-negotiable instruments.

We do not think that the present case can be distinguished from the cases to which we have referred by reason of the fact that the payee named in the note was made one of the defendants in the suit.

On the authority of the cases to which we have referred we must allow the appeal and restore the decree of the Munsif dismissing the suit with costs. In the circumstances we direct that the parties shall bear their own costs in this Court and in the lower appellate Court.

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1. (1904) I. L. R. 28 M. 205.
2. (1906) I. L. R. 30 M. 88.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present :—Mr. Justice Benson and Mr. Justice Miller.

Nimmakayala Padmanabhadu and another .. Appellants* (*Plaintiffs.*)

v.

Nookala Rajappa and others .. Respondents (*Defendants.*)

Padmanabhadu v. Rajappa.

Pleader and client—Party not entitled to raise points not pressed by the Vakil in the lower Court.

A party cannot be allowed to raise a contention not pressed by the Vakil in the lower Court.

Appeals from the decree of the Subordinate Judge's Court of Cocanada in O. S. No 41 of 1901.

C. Madhavan Nair and *M. Kunjunni Nair* for appellants.

T. V. Seshagiri Aiyar and *T. V. Muthukrishna Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—The defendants who are the appellants in Appeal Suit No. 173 rely on Exhibit *A* as sufficient to show that the plaintiffs are not the reversioners of Chinna Venkanna; but, as this document was signed by the 1st plaintiff when a minor, and under the influence of the 1st defendant, we are not prepared to hold it sufficient to nullify the evidence set forth by the Subordinate Judge which proves that the plaintiffs are in fact the reversioners.

The appellants in A. S. No. 171 are the plaintiffs, and they contend that the Subordinate Judge was wrong in finding that the lands in Pedagodavalli were not in the possession of Lachmidevi and alienated by her to the 1st defendant.

It is not open to the plaintiffs now to raise this contention as their Vakil before the Subordinate Judge did not press their claims to these lands—*Raja Bommadevara Venkatanarasimha Naidu* v. *Raja Bommadevara Bhashyakarlu Naidu.*[1] We think that the plaintiffs have failed to prove their contention in regard to these lands.

In the result, we dismiss both the appeals with costs.

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*A. Nos. 171 and 173 of 1903. 17th February 1908.

1. (1902) 29 I. A. p. 79; S. C.; I. L. R. 25 M. 369.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :— Sir Charles Arnold White, *Kt.*, Chief Justice and Mr. Justice Miller.

Angappa Chetty and another .. Appellants* (*6th and 8th Counter-Petitioners*).

v.

G. Nanjappa Row and others .. Respondents (*Petitioners*).

Angappa Chetty v Nanjappa Row.

C. P. C., S. 351—Insolvency, declaration of—Unfair preference—"Act of bad faith"—"Payment."

Assignments of actionable claims are "dispositions of property" within the meaning of S. 351, C. P. C.

If a man on the eve of bankruptcy makes a payment to a particular creditor, the presumption immediately arises that he makes that payment with the dominant view of giving a preference to that creditor over his other creditors. There is no need for any evidence that the view was expressed in so many words by the bankrupt. It is a presumption which would arise from the transaction.

It is sufficient to constitute an unfair preference if the preference is the substantial, effectual or dominant view of the debtor, though not the sole view.

A preference might be an unfair preference even though the payment might never have been made but for pressure, if it was also the fact that the payment would never have been made but for the desire to prefer in the sense that the desire was the dominant view of the debtor.

Held also that in the circumstances of the case there was no unfair preference.

Appeal from the order of the District Court of Coimbatore, in Insolvent Petition No. 1 of 1905.

C. Sankaran Nair and *T. R. Ramachandra Aiyar* for appellants.

A. S. Cowdell instructed by *Orr, David* and *Brightwell* for respondents.

The Court delivered the following

JUDGMENTS :—*The Chief Justice* :—This is an appeal by creditors against an order made under S. 351 of the Code of Civil Procedure, declaring the respondents insolvents and appointing a Receiver. Anything like a satisfactory administration of the insolvency provisions of the Code is always a matter of difficulty, and in this particular case the difficulty is increased by the facts being somewhat complicated and the evidence being incomplete. For the purposes of the questions raised in this appeal, so far as

* A. A. C. 16 of 1906, 28th November 1906.

Angappa Chetty v. Naniappa Row.

Chief Justice.

they can be gathered from the evidence before this Court, the facts may be briefly stated as follows :—The respondents are planters and were the owners of two estates known as the Tudor Valley Estate and the Bakely Coffee Estate. On July 20th, 1887 the respondents mortgaged the Tudor Valley Estate to Mr. Gore Langton for Rs. 25,000 and a further advance of Rs. 10,000 was afterwards made. On March 23rd, 1891, the respondents agreed to sell the Tudor Valley Estate to Rangiah Goundan for Rs. 77,500 of which Rs. 25,000 was to be appropriated in discharge of Mr. Gore Langton's mortgage. This agreement resulted in protracted and costly litigation between Rangiah Goundan and the respondents. Rangiah Goundan took possession of the Tudor Valley Estate and both sides filed suits for possession whilst Rangiah Goundan also filed a suit for specific performance of the agreement to sell. These suits ultimately resulted in favour of the respondents. On July 19th, 1892, Rangiah Goundan took a transfer of Mr. Gore Langton's mortgage and in 1896 he brought a suit on the mortgage against the respondents (O. S. No. 74 of 1896). In the same year the respondents brought a suit (O. S. No. 82 of 1896). against Rangiah Goundan for mesne profits for the five years during which the latter had been in unlawful possession of the estate. On April 15th, 1896, the respondents mortgaged the Tudor Valley Estate and the Bakely Estates to Mr. Gore Langton for £2,000 and on October 29th, 1900, Mr. Gore Langton assigned his mortgage to Messrs. Arbuthnot and Latham. On August 27th, 1901, the respondents executed a second mortgage on the two estates to Messrs. Stanes & Co., to secure an advance of Rs. 15,000 odd and further advances not exceeding Rs. 20,000.

The suits of 1896 were carried to the High Court with the result that Rangiah Goundan obtained a decree against the respondents for Rs 78,000 and the respondents obtained a decree for Rs. 1,25,000 against him. Both parties obtained leave to appeal to the Privy Council. At this stage a compromise was agreed to. Rangiah Goundan paid Rs. 30,000 into the High Court and on March 15th, 1905, leave was given to both parties to withdraw their appeals to the Privy Council. On July 7th, 1903, the respondents assigned to Mr. Gore Langton by way of further security but without any fresh advance their claim in

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their pending suit for mesne profits. On July 9th, 1903, the respondents assigned to Messrs. Stanes & Co., by way of further security and subject to the assignment to Mr. Gore Langton the same claim.

In 1899 one Angappa Chetty brought a suit against the respondents (O. S. No. 31 of 1899) and obtained a decree for Rs. 7,000 odd. In November 1904, in execution of this decree and prior to the compromise, he attached the decree which had been obtained by the respondents in their suit for mesne profits. He subsequently attached the Rs. 30,000 in the hands of the Registrar of this Court. The Rs. 30,000 was transferred from this Court to the Coimbatore District Court. The points raised in support of the appeal were (1) that the compromise of March 1905 was in fraud of the rights of Angappa Chetty as an attaching creditor; (2) that the compromise operated as an unfair preference to Rangiah Goundan and also to Mr. Gore Langton and Messrs. Stanes & Co., and was given at a time when the respondents knew they could not pay their debts in full; (3) that the two assignments of 1903 were unfair preferences to Mr. Gore Langton and Messrs. Stanes & Co., respectively, and were given at times when the respondents knew they could not pay their debts in full; (4) that the respondents recklessly contracted debts when they knew they could not pay their debts in full; (5) that the 1st respondent had been guilty of an act of bad faith in not including in his schedule the monthly allowance of Rs. 65 which he had been receiving from Messrs. Stanes & Co.

As regards (1), Angappa Chetty's judgment-debt was for Rs. 7,000 odd. The amount of the respondents' decree which Angappa Chetty attached was Rs. 1,25,000. In pursuance of the compromise Rs. 30,000 was paid into Court. It was suggested that, in the application to this Court for leave to withdraw the ...ivy Council appeals in pursuance of the compromise, the atten- ... Court was not called to the fact that the decree had ...d by Angappa Chetty. This does not appear to be ... Chetty obtained in the High Court an order of ... respect of this Rs. 30,000 and the money was ... this Court to the Coimbatore District Court ...e purpose that Angappa Chetty's claims under ...ight be adjudicated on by that Court. Mr.

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Cowdell on behalf of the insolvents stated that Angappa Chetty had been paid the whole of his judgment-debt out of the Rs. 30,000. Mr. *Sankaran Nair* on behalf of the appellants was not in a position to disprove this statement and admitted that, at any rate a substantial sum had been paid out of Court to Angappa Chetty towards the satisfaction of his debt. On the other hand an application to this Court on November 1st, 1905, that Angappa Chetty's attachment should be raised, and that Rs. 6,640 should be paid out to the parties in whom Mr. Gore Langton's interest under the assignment is now vested, was dismissed on the ground that there was no consideration for the assignment and no assignment of an actionable claim.

Mr. Stanes stated in his evidence that he intended to file a suit on behalf of Mr. Gore Langton to establish his claim. Whether this has been done or not I do not know. But, as matters stand at present, Angappa Chetty has established his right to proceed against the funds in Court under his attachment, whilst Mr. Gore Langton, as matters now stand, has failed to establish his right to proceed against this fund under his assignment. The practical result of the compromise, so far as Angappa Chetty was concerned, was that instead of being in the position of an attaching creditor of an unexecuted decree, he was in a position to proceed against tangible assets in Court. It cannot be said that the compromise was in fraud of Angappa Chetty's rights or that he was prejudiced thereby. Even if it were in fraud of his rights, I do not see how the transaction could be treated as an " act of bad faith regarding the matter of the application" within the meaning of S. 351, C. P. C. I may add that this point appears to have been an after-thought since it does not seem to have been taken in the Court below.

As to (2). At the date of the compromise the respondents had a decree for Rs. 1,25,000 against Rungiah Goundan whil
Rungiah Goundan had a decree for Rs. 78,000 against
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decide wether the appellants were solvent or i

But, in my view, it is not necessary to decide this question since I am satisfied that in entering into the compromise the view of the respondents was to make the best arrangement they could for themselves and not the view to prefer Rangiah Goundan.

As the parties had apparently been trying each to ruin the other by persistent litigation, Rungiah Goundan was the last person they would have wished to prefer. No doubt the compromise was followed almost immediately by the presentation of the insolvency petition and under the compromise the respondents relinquished the chance of finally emerging from the struggle some Rs. 47,000 to the good, but they freed the Tudor Hill Estate from Rungiah Goundan's mortgage, they got a deposit of Rs. 30,000 in Court, and they escaped the risks and expenses attendant on fighting Rangiah Goundan's appeal and prosecuting their own appeal before the Privy Council. I hold, without hesitation, that the compromise was not an unfair preference of Rungiah Goundan. It seems to me to be equally clear that it was not an unfair preference of Mr. Gore Langton and Messrs. Stanes & Co. The object of the transaction was to put an end to the ruinous litigation—not to benefit Mr. Gore Langton and Messrs. Stanes & Co., though it may be that the transaction was in fact beneficial to them.

As regards (3). I express no opinion as to whether the respondents were insolvent to their own knowledge in 1903. For the purposes of this case, I am prepared to assume that they were. I do not think it necessary to consider whether any legal distinction can be drawn between an "unfair preference" under S. 351 of the Code and a 'fraudulent preference' under the English Bankruptcy Acts. Neither do I think it necessary to consider whether, as a matter of law, the words 'unfair preference' which appear to be taken from an enactment of 1861, are to be construed with reference to the principles on which the cases prior to the Act of 1869 and the earlier cases under the Act of 1869 were decided, or whether the more stringent test applied in the later cases under the Act of 1869, and in the cases under the Act of 1883, should be applied here. I am prepared to apply the test laid down in such cases as *ex-parte* Hill—*In re* Bird, [1] *viz.*, that it is sufficient to constitute an unfair preference if preferring the

1. (1883) 23 Ch. 695.

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Chief Justice.

creditor was the substantial, effectual or dominant view with which the debtor made the preference, and that it is not necessary that it should have been the sole view, and in such cases as *In re Bell* [1] viz , that notwithstanding the payment might never have been made but for pressure it is an unfair preference if it is also the fact that the payment never would have been made but for the desire to prefer if it is the fact that a desire to prefer was a substantial view operating in the mind of the person who pays in such a sense that it can be said to be the dominant view; and in such cases as *In re, Exparte Dyer* [2] *Lake viz.*, that "if a man on "the eve of bankruptcy makes a payment to a particular creditor, "the presumption immediately arises that he makes that payment "withthe dominant view of giving a preference to that creditor over "his other creditors. There is no need for any evidence that that "view was expressed in so many words by the bankrupt: it is a "presumption which would arise from the transaction." No question of payment is involved in the alleged unfair preference in the present case, but the assignments of the "actionable claim" were no doubt, "dispositions of property" and the same principles seem to me to be applicable. It is, of course, an important element in the case that no fresh advances were made either by Mr. Gore Langton or Messrs. Stanes & Co. in 1903. Mr. Stanes's evidence not very full but it is as follows :—

"We have been Mr. Gore Langton's agents for ten or fifteen "years. *Re-examined.* 'Nanjappa Row owed us money, a little "over four thousand rupees in 1891. We have been advancing "him money since then for his litigation expenses and for the up-"keep of the estates. The money that he owes us is for those "litigation expenses and up-keep. I don't know that he could "get money elsewhere for those purposes. He applied to us for "money and we advanced it. In the years 1891 to 1895, we did "not advance money for the up-keep of the estates because "Rangiah Goundan was in possession then. Since 1896 we have "advanced for the up-keep of the estates. The statements in the "two assignment deeds of the 7th and 9th July 1903 are all quite "true. At that time Nanjappa Row owed us twenty thousand "rupees and owed Mr. Gore Langton £ 1,900 principal and £ 680 "towards interest. We had only a second mortgage subject to

1. (1892) 10. Morrell 15. 2. (1901) I K. B. 710.

" Mr Gore Langton's. Our assignment was also subject to " Mr. Gore Langton's. We pressed for further security telling " Nanjappa Row that if he did not give it we could not continue " to finance him. We had authority from Mr. Gore Langton to " demand further security for him too. "

This evidence is uncontradicted. Messrs. Stanes & Co. were the agents for Mr. Gore Langton and the 1st respondent stated in his evidence that when Messrs. Stanes & Co. asked him (in 1903) for further security for Mr. Gore Langton and for themselves, they said thay would not finance him further if it was not given.

I am of opinion that the dispositions of property made by the respondents in 1903 were not made with the dominant view of preferring Mr. Gore Langton and Messrs. Stanes & Co. or either of them, but that they were made with the object that the respondents might continue to receive financial support from these creditors and that they were made under pressure by these creditors in circumstaces which negative a preference being the dominant view with which the dispositions were made.

As regards (4) the evidence mainly relied upon by the appellants as showing that the respondents had recklessly contracted debts at a time when they knew themselves to be insolvents was a judgment in a suit in which the minor son and brothers of the 1st respondent were the plaintiffs and in which they asked for a declaration that a decree was void as the debt for the recovery of which the suit had been instituted had been contracted by the 1st respondent for unnecessary and immoral purposes. Even assuming that the judgment be evidence against the respondents, it is not, in my opinion, evidence that the 1st respondent recklessly contracted debts so as to disentitle him to an order under S. 351, and I think the lower Court was right in holding that the respondents had not recklessly contracted debts within the meaning of the section.

As to (5). I am of opinion that the omission to include in the schedule the monthly allowance of Rs. 65 received by the 1st respondent, is not an act of bad faith regarding the matter of the application which disentitles the respondents to the benefit of the section.

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Miller J.

I am of opinion that the appeal should be dismissed with costs.

Miller J:—I concur in dismissing the appeal and desire only to add a few words on two of the questions raised.

I think that the charge of reckless borrowing is the most effective weapon ready to the hand of the appellants, but that even with its assistance they must fail. The debts dealt with in the judgment, Exhibit I, were contracted long before the insolvency, before the year 1899, and do not affect the present question. The judgment merely shows that several years ago Nanjappa Row was extravagant in his habits. But there are other debts which invite examination; there are the debts described as contracted on pro-notes of unknown dates, and these amount to about Rs 12,000. If they were contracted after the decrees in 1903 and if at that time Nanjappa Row was insolvent to his knowledge, it would lie upon him to justify them. There is no evidence to prove the dates of borrowing and in one case only is there anything to indicate such date, the counter-petition of Jacob Pillai; but assuming that all these debts were contracted after July 1903, still I do not think that the evidence shows that Nanjappa Row was hopelessly insolvent before 1905 when by the compromise he finally settled the amount of his assets. If the Privy Council had decided that Rangiah Goundan's application for execution was governed by Art. 179 and not by Art. 178 of the 2nd schedule to the Limitation Act, Nanjappa Row would have had a reasonable prospect of paying all his debts in full, and there is nothing to indicate that Nanjappa Row did not believe in his appeal, or did not mean to prosecute it. In such circumstances, I do not think that the borrowing of a sum of Rs. 4,000 from Jacob Pillai, or even of Rs. 12,000 can bring Nanjappa Row within S. 341.

The only other question on which I have anything to say is whether Nanjappa Row is guilty of an act of bad faith in omitting from his schedule the monthly payment of Rs. 65 which was made to him by Messrs, Stanes and Co. for managing the coffee estates. If this were a salary provided by Messrs. Stanes and Co. there might be justification for the attack on the good faith of the insolvent, but as the payment is presumably an advance against the estates it is in fact a part of the working expenses of

the estates and its omission from the schedule was not an act of bad faith.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Boddam and Mr. Justice Munro.

Sankara Pillai *alias* Sankaranarayana Pillay ..Petitioner*
(*Accused.*)

Cr. P. C., S. 367—Judgment—" Shall be dated and signed by the presiding officer "—Judgment dated and signed by successor—No irregularity. **Sankara Pillai *In re.***

Under S. 367, Cr. P. C., it is not necessary that the presiding officer of the Court who wrote the judgment should be the same person as the presiding officer who is required to date, sign and pronounce it.

Petition under Ss. 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of the Sessions Court of Tinnevelly in Cr. A. No. 52 of 1907 presented against the conviction and sentence passed by the Sub-Divisional 1st Class Magistrate of Shermadevi in C. C. No. 28 of 1907.

Obsborne and *M. K. Narayanaswami Aiyar* for petitioner.

The Crown Prosecutor contra.

The Court delivered the following

JUDGMENT :—It appears from the explanation given and also from the diary that the case was adjourned for judgment on the 5th August. Afterwards, and before the judgment was written, an application was made to call another witness for the defence. No order was made upon that application and the judgment was written on the 14th. The Magistrate, before it was delivered, left, and another Magistrate was appointed in his place who read out his predecessor's judgment and sentence and signed and dated it in open court on the 19th August. It is contended that this is illegal and that, inasmuch as the judgment and sentence were not delivered in open court by the Magistrate who heard the case and wrote the judgment, the accused should have been retried.

We are of opinion that the course adopted was not illegal or improper and that, under S. 367 of the Criminal Procedure Code, it is not necessary that the presiding officer of the court who

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* Cr. Rev. Case No. 410 of 1907. 26th February 1908.
Cr. Rev. Pet. No. 808 of 1907

Sankara Pillai *In re.*

wrote the judgment should be the same person as the presiding officer who is required to date, sign and pronounce it in open court Moreover, we are clearly of opinion that even if it was an irregularity it did not prejudice the accused. (*See* High Court Proceedings, dated 28th August 1879, No. 1351, in 2 *Weir* p. 4387.

It was next argued that the evidence did not justify the conviction of the accused, but on this point there can be no doubt that the conviction was correct.

We dismiss the criminal revision petition.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Sankaran Nair.

Murugappa Asari .. Appellant* (*Plaintiff.*)

v.

Santhiammal .. Respondent (*Defendant.*)

Murugappa Asari v. Santhiammal.

C. P. C., S. 13—"*Heard and decided*"—*Reservation of right in decree.*

Held that a decree which reserves to plaintiff the liberty of bringing a fresh suit in respect of the same matter cannot operate as *res judicata.*

Second Appeal from the decree of the District Court of Chingleput in A. S. No. 42 of 1905 presented against the decree of the Court of the District Munsif of Chingleput in O. S. No. 425 of 1904.

Suit for possession of lands. The plaintiff was a purchaser in court-auction. A prior suit by the plaintiff for possession was dismissed on the ground that the plaintiff had not obtained a sale certificate. The lower court dismissed the present suit as barred by *res judicata*.

V. Viswanatha Sastri for appellant :—The question is whether the suit is barred by *res judicata*. In the previous suit brought by the defendant against my client, the present plaintiff, for possession of the suit properties, the judgment and decree were that the then plaintiff was entitled to possession without prejudice to any rights which my client, the plaintiff, might have in respect of the suit properties as purchaser at a revenue

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* S. A. 1295 of 1905. 19th February 1908.

sale though the sale certificate had not then issued. The judgment and decree expressly reserved my rights. Certificate was issued to me only after the decree. I now sue for possession. Such a judgment is illegal—*Watson* v. *The Collector of Rajshahye.*[1] If the decree is legal there is a reservation of my rights therein. If it is illegal it cannot operate as *res judicata.* In either case I am not barred. Until the issue of the certificate I could not have resisted the claim.

Murugappa Asari v. Santhiammal.

The respondent was not represented.

The Court delivered the following

JUDGMENT :—The respondent does not appear. The decision which is relied on as operating as *res judicata*, itself provides that the present plaintiff shall be at liberty to sue for the recovery of the land in question after the issue of the sale-certificate. The decree is quite irregular in form, but having regard to this special provision, we do not think it operates as *res judicata.*

The decrees of the lower Courts must be set aside and the suit remanded to the Court of First Instance for disposal according to the law.

Costs hitherto incurred will abide the event.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER, HYDERABAD ASSIGNED DISTRICTS.]

Present:—Lord Robertson, Lord Collins and Sir Arthur Wilson.

Pestonji Jivanji and others .. Appellants *

v.

Eduji Chinoy and others .. Respondents.

Pestonji v. Eduji.

Native State—East India Company—Cantonment land—Rights of alienation and management and control of the same in the absence of any treaty.

When the Nizam's Government admitted a British force within its territory, and allotted to it the Secunderabad cantonment as its Head Quarters, it no doubt, by necessary implication, conveyed to the military authorities all powers of jurisdiction, control and management incident to maintaining the efficiency of the troops, and the peace and good order and convenient use of the cantonment. But it would be going a long

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* 12th February 1908.

1. (1869) 13 M. I. A. 160.

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way beyond this to hold that the officer commanding the troops could be held empowered to alienate, in perpetuity, land forming part of the cantonment, and undoubtedly Hyderabad territory, for a purpose wholly unconnected with military requirements, *e.g.*, the building of a Tower of Silence for the Parsi community as in this case.

Held also that the effect of the averments in the suit was to show a title in the plaintiff-appellant's predecessors to the plot in question as against the whole community of which they (the predecessors) were members.

Appeal from a decree of the Court of the Judicial Commissioner, Hyderabad Assigned Districts (December 12, 1901) reversing a decree of the Court of the Superintendent, Residency Bazaars, Hyderabad (March 25, 1901).

The question involved in the appeal was the title to a plot of land on which stands a Parsi Tower of Silence, situated in the south-eastern corner of the Cantonment limits of Secunderabad. The two Courts below came to different conclusions.

Jardine K. C., and *De Gruther*, for the appellants, contended on the evidence that the title in the land was in the founders, Viccaji and Pestonji, personally.

Ross, for the respondents, contended that the appellants failed to prove any grant, oral or documentary, by which they acquired an exclusive title to the land in question, or any portion of it, and that the evidence on the record, taken as a whole, proved that the property belonged to the Parsi community and not to the appellants exclusively. Reference was made to S. 90 of the Indian Evidence Act (1 of 1872).

Their Lordships' judgment was delivered by

Sir Arthur Wilson :—The controversy out of which this appeal arises lies between various members of the Parsi community, and relates to certain lands situated in the Secunderabad Cantonment, on a portion of which stands a Parsi Tower of Silence.

In or about the year 1895, the respondents purporting to act on behalf of the Parsi community, resolved to erect on the land in question a second Tower of Silence in addition to that already there. The appellants objected to this proceeding claiming as descendants, and representatives in title, of the original founders.

Negotiations for a settlement having failed, the appellants filed the present suit. They alleged that the founders were in

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their lifetime the owners of the land in question, and that the property had devolved upon themselves, and they proceeded to complain of the respondents' encroachment.

The respondents who were defendants in the suit, asserted that the land had been granted to the whole Parsi community for a public purpose, and to enure for the benefit of that community generally for all time, by the Cantonment Authority.

In the Courts in India the defendants further set up, that if the grant had been to the founders, the latter had subsequently dedicated the land to the purposes of the Parsi community generally. It was also contended that a title, good against the founders and their representatives, had been acquired by adverse possession. On both these points the Courts in India found against the defendants, and their Lordships have not been asked to review those findings. The sole question discussed on the argument of the appeal was that of the original title to the property.

The Judge who tried the case decided in favour of the plaintiffs, now appellants, and granted an injunction. On the appeal the Judicial Commissioner reversed that decision and dismissed the suit. Hence the present appeal.

The founders, already mentioned, were two brothers, Parsis, Pestonji Meherji and Viccaji Meherji, who in 1837 and afterwards carried on business as Bankers at Hyderabad and in other places. It appears from the correspondence that, at about that time, they had made up their minds to make Hyderabad their home, and they determined at the same time to establish a Tower of Silence; for which purpose it was necessary both to obtain the ground on which the Tower could be built, and to establish the necessary priests for carrying on the services and ceremonies required by the Parsi religion.

It is clear that with regard to the establishment of priests everything was done by the brothers Pestonji and Viccaji. They found the proper persons, and arranged with them to come and settle at the spot to be selected. They undertook the responsibility for their salaries, though the priests were to be at liberty to receive fees for the performance of ceremonials from other Parsis.

Pestonji and Viccaji also, through their agent at Seçunderabad, made all the necessary arrangements for obtaining the

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site required. It is not necessary to examine all the contemporary papers in evidence. The most important document relied upon by the plaintiffs is the following:—

"Ijat Asar Balkishna Reddy Mucaddum of the village of Bholuckpore, in the District of Hoosain Saugar, may you be well; year 1248 Sal (*i. e.*,) Fasli. The reason of writing this is that the Bankers Pestonji and Viccaji having applied and Government having sanctioned the grant to them of the Hill which is near Gattula Naganna Kunta in the Devini Bhavi Kancha within the boundary of the said village for depositing bones, the Taluqdar Raja Rang Rao Bahadur has sent order and therefore it is hereby written that you deliver up the said Hill to the said Bankers Pestonji and Viccaji. Note that this is peremptory order in this matter. The date the 25th Rabiul-awal (*i.e.*) June (1838).

Ibrthim Khan, Naid (In Persian) Peith Mashirabad.

This document was held by the Judge who tried the case to be a genuine document, a finding for which he assigned cogent reasons. The learned Judge who heard the case on appeal pointed out a variety of circumstances which he thought threw suspicion upon the document. But he did not overrule the finding of the first Court that it was genuine. Their Lordships see no sufficient reason why they should reject that finding.

The next document of high importance is the following:

"This is to certify that the Parsis of Secunderabad have permission by order of Brigadier Wahab, C. B., Commanding Hyderabad Subsidiary Forces, to enclose the Hill by name Nomavunghutt for a burying place, the circumference of which is about (18) eighteen hundred feet, and immediately adjoining the south end of Nawganah's garden and near the public Bearers' line in rear of the Cantonment of Secunderabad."

"This Hill is given for a tower only to be built on its summit

"H. F. F. Considine

Assistant Quarter Master General,

Hyderabad Subsidiary Force.

"Assistant Quarter Master General's Office,

Head-Quarters, Hyderabad

Subsidiary Force.

"Secunderabad 15th January 1839."

That document was actually obtained on behalf of the two brothers through their agent, but it is the latter upon which

the respondents chiefly rest their case. Their contention is that that document formed the real root of title to the land in question, and that by its terms the grant was one to the Parsi community generally, and not to the two brothers personally.

Before examining these two documents and their relation one to the other, it is well to consider the authority from which each document issued, and the relation of those authorities one to the other. The first of the two documents clearly was issued by an officer of the Hyderabad State, and it purports to express a transaction, by which the State had assented to the grant of the land to the two brothers, and directed possession of it to be delivered to them. The second document purports to be issued by the authority of the Brigadier commanding the Hyderabad Subsidiary Force—a force which had its headquarters in the Secunderabad Cantonment.

The establishment of the Subsidiary Force, and its modifications from time to time may be collected from Aitchison's Treaties, Vol. 8, at and after p. 264, and from the various treaties and agreement which follow. It was a force in the employment of the East India Company, and commanded by the Company's Officers, but maintained, by agreement, in Hyderabad Territory for the protection of the Nizam.

The research of counsel was unable to discover any treaty prescribing the limits of the powers of the Nizam's Officers on the one hand, and the Military Commander on the other, with respect to the management, control and disposition of the Cantonment and the land comprised in it. And it appears clear that no such treaty ever was in existence.

When the Nizam's Government admitted a British Force within its territory, and allotted to it the Secunderabad Cantonment as its Head-quarters, it no doubt, by necessary implication, conveyed to the Military authorities all powers of jurisdiction, control, and management incident to maintaining the efficiency and the discipline of the troops, and the peace and good order and convenient use of the Cantonment. But it would be going a long way beyond this to hold that the Officer Commanding the troops could be held empowered to alienate, in perpetuity, land forming part of the Cantonment, and undoubtedly Hyderabad territory, for a purpose wholly unconnected with military

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requirements. These considerations must be borne in mind in estimating the effect of the two documents which have been cited.

There appears to be no real difficulty in reconciling the two documents, and appreciating their effect. The first, emanating from the State, purports to deal with, and enforce, a grant of the land by the State to the two founders by name, and the delivery of possession to them. The second document, emanating from the Cantonment Authorities, does not deal with title or possession but gives permission to use the land, already conveyed, for the particular purpose of a Tower of Silence, and to enclose the land. The effect of the two documents is to show a good title in the founders, and not in the Parsi community.

What happened afterwards only confirms this view. The founders admittedly enclosed the land, and erected a Tower of Silence upon it, at their own expense. About the same time, or shortly afterwards, they erected a Fire Temple upon land which they acquired by private purchase, and endowed it.

The evidence as to the possession, management and control of the Tower of Silence and of the land on which it stood, shows these to have been in the founders. The only question being who were the original grantees, the events of the early years, after the acquisition of the land and the erection of the Tower, are much more important than those of later years, when the circumstances of the parties had somewhat changed. And in those early years we find, from the correspondence, that the priests referred such difficulties or questions as arose for the orders of the founders, and obeyed those orders.

The founders, certainly down to the year 1863, bore the whole expense of the establishment, and all costs of maintenance and repair. During those years the Parsi community were not represented by any Committee, or other organization. Therefore during those years, the founders had no rivals in respect of possession and control, for the suggested possession and authority of the head priest is negatived by his own letters to the founders.

After 1863, the Parsi community from time to time subscribed money in aid of additions and improvements, and from 1882 onwards there was a Committee representing, in some sense, the community. But what happened in these later years can

throw but little light upon the nature of the grant of, or soon after, 1837.

Their Lordships are of opinion that the view of the case taken by the Judge who tried it was correct. They will humbly advise His Majesty that the decree of the Judicial Commissioner should be discharged with costs, and that of the Court of the Superintendent restored. The respondents will pay the costs of this appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis and Mr. Justice Sankaran Nair.

Miyaji *alias* Mahomed Ghouse Sahib.. Appellant* (*Defendant*).

v.

Sheik Ahmed Sahib and another .. Respondents (*Plaintiff and Supplemental Respondent*).

Miyaji v. Sheik Ahmed.

Religious Endowments Act, S. 14—Decree, form of—Jurisdiction to appoint trustee—New Trustee, appointment of—Mahomedan Law—Durga—Duties of trustee—Accounts, liability to keep—Married man, incompetency of to be a Jamashin.

A trustee of a Durga is bound to maintain accounts; and if the institution falls under S. 4 of Act XX of 1863, he is bound also to submit the accounts to the Committee.

Under S. 14 of Act XX of 1863, the Court has jurisdiction to direct a competent person to appoint a trustee and to direct delivery of possession by the dismissed trustee to the person properly appointed. If there is no person competent to represent the trust, the proper course is to appoint a receiver and direct delivery of possession to him. So long as a trustee is in possession, whether before or after dismissal, he is liable to render accounts. A dismissed trustee is entitled to get a discharge and to be relieved of all obligations as a trustee by the Court.

Quaere.—Whether the Court itself has jurisdiction to appoint a trustee.

A married man is unfit to be a Jainashin of a Durga according to usage.

Appeal from the decree of the District Court of South Arcot in O. S. No. 20 of 1900.

T. R. Ramachandra Aiyar for appellants.

C. Ramachandra Rao Saheb and *K. R. Subramanya Sastri* for respondents.

T. R. Ramachandra Aiyar:—A Sajjadanashin (*i. e.*, a Jainashin) is certainly entitled to his own maintenance—*Mohiuddin* v.

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* A. S. No. 147 of 1904. 24th January 1908.

Miyaji v. Sheik Ahmed.

Sayiuddin[1]; *Secretary of State for India* v. *Mohiuddin Ahmad*[2]; *Fakuruddin Saheb* v. *Ackeni Saheb*.[3] Maintaining the relations is at the worst only a breach of trust of a venial character—*Sivasankara* v. *Vadagiri*.[4] A trustee ought not to be removed when under a *bona fide* mistake he sets up a right to the trust property or treats it as his own—*Annaji* v. *Narayan*[5]; *Damodar* v. *Bhat Bhogilal*[6]; *Fakurudin Sahib* v. *Ackeni Sahib*[3]; *Muhammad Jafar* v. *Muhammad Ibrahim*[7]; A trustee is not to be dismissed unless the interests of the trust absolutely demand such dismissal. Even in cases of misappropriation, the Court may impose conditions, *viz*, the replacing of the trust funds instead of removing the trustee—*Sivasankara* v. *Vadagiri*.[4]

The Court has no power to direct the appointment of a new trustee—*Sivayya* v. *Rama Reddi*[8]; nor to direct possession to be delivered to such trustee. [*Sankaran Nair* J.—See 10 M. 375]. In that case there was an express prayer for possession, and, besides, it was not a suit under S. 14 of Religious Endowments Act. Suits under S. 14 are of a special kind for a special purpose. Reliefs not mentioned in that section cannot be given—*Sivayya* v. *Rami Reddi*[8]; *Mahalinga* v. *Venkaboy*.[9] [*Wallis* J.—It is not an additional relief; it is a relief incidental to removal.] Delivery of possession is not incidental to removal—*Netti Rama* v. *Venkatacharlu*.[10] In the absence of sanction, such relief cannot be given—*Srinivasa* v. *Venkata*[11]; and *Giyananda* v. *Kristo Chandra*.[12] Plaintiff ought to have applied for sanction under S. 539, C. P. C.—*Jan Ali* v. *Raninatt Mundu*[13]; *Narayana Ayyar* v. *Kumarasami Mudaliyar*[14]; *Thiervu Pandithan* v. *Secretary of State for India*[15]; and *Sayad Hussain* v. *Collector of Kaira*.[16] Even then only after paying Court-fee for possession. [*Wallis* J.—S. 539 is only an enabling section.] [*Sankaran Nair* J.—Why should we not appoint a receiver?] No. Because the property is not the subject-matter

1. (1893) I. L. R. 20 C. 810.
2. (1900) I. L. R. 27 C. 674.
3. (1880) I. L. R 2 M. 197.
4. (1889) I. L. R. 13 M. 6.
5. (1896) I. L. R. 21 B. 556
6. (1896) I. L. R. 22 B. 493.
7. (1900) I. L. R. 24 M. 243.
8. (1899) I. L. R. 22 M. 223.
9. (1879) I. L. R. 4 M. 157.
10. (1902) I. L R. 26 M. 450.
11. (1887) I. L. R. 11 M. 148.
12. (1901) I. L. R. 8 C. W. N. 404.
13. (1881) I. L. R. 8 C. 32.
14. (1899) I. L. R. 23 M. 537.
15. (1897) I. L. R. 21 M. 450.
16. (1895) I. L. R. 21 B. 227.

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of the suit; *Giyananda* v. *Kristo Chandra* [1]; *Kidambi Raghavacharya* v. *Terumali Asari*.[2] A receiver can be appointed only *pendente lite* or pending execution proceedings, or there must, be a claim for the appointment of a receiver in the plaint. Again the direction for payment of damages to a trustee that might thereafter be appointed is bad. He is no party to the suit. [*Wallis* J.—The trust is the party.] The new trustee is not before your Lordships as trustee but only as worshipper. He is a married man, though one of the alleged reasons for the removal of the defendant is that he is a married man. There may be disputes as to the validity of the appointment. Is this Court to determine all that?

K. R. Subrahmanya Sastri.—Not keeping proper accounts—*Fakuruddin Sahib* v. *Ackeni Sahib* [3]; treating the trust property as his own—*Chintaman* v. *Dhondo*[4]; *Sivasankar* v. *Vadagiri*[5]; mortgaging trust property—*Sadappaya* v. *Periasami*[6]; giving long leases and misappropriating and misapplying trust finds (*e.g.*, for the maintenance of his relations), are each of them sufficient to justify his dismissal. He knew that the inam was not personal. Long enjoyment of the income is no proof of right—*Fakuruddin Sahib* v. *Ackeni Sahib* [3]. You must look to the terms of his appointment by the committee to see whether he is entitled to maintenance, whatever the previous practice or the law may be elsewhere. The practice has become obsolete.

C. Ramachandra Rao Saheb.—The Court may appoint a trustee in suits under S. 14—*Sheoratan* v. *Ram Pargash*.[7] The observation of *Shephard* J. in *Sivayya* v. *Rami Reddi*[8] is *obiter*. Appointment of trustee and delivery of possession are incidental to the main relief, *viz.*, removal of the trustee. Ancillary reliefs may be granted without sanction—*Muhammad Jafar* v. *Muhammad Ibrahim*. [9] The Court has an implied power to do everything necessary for the effective exercise of the jurisdiction conferred upon it—Maxwell (4th Edn.) p. 534. It is the Court's duty to protect charities. S. 14 is intended for the protection and due administration of charities—*Syed Amir* v. *Ibrahim*.[10] Why should the trust be put to the additional expense of suing to eject him? It is not a new

1. (1901) 8 C. W. N. 401.
2. (1902) I. L. R. 26 M. 463.
3. (1880) I. L. R. 2 M. 197.
4. (1888) I. L. R. 15 B. 612.
5. (1889) I. L. R. 13 M. 6.
6. (1890) I. L. R. 14 M. 1.
7. (1896) I. L. R. 18 A. 227.
8. (1899) I. L. R. 22 M. 223.
9. (1900) I. L. R. 24 M. 248.
10. (1868) 4 M. H. C. 112.

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relief. Court-fee need not be paid for the doing of that which it is the Court's duty to do. No relief is claimed by the plaintiff personally. The decree as framed is not without precedent—*Giyana Sambanda* v. *Kandasamy* ;[1] *Sheonatan Kunwari* v. *Ram Pargash*.[2] The Committee has already appointed a trustee. Possession may be delivered to him. If that cannot be done, a receiver may be appointed to take charge of the property. (A. S. 146 of 1904.) The property is the subject-matter of the suit —*Yashwant* v. *Shankar*.[3] Receiver may be appointed by decree or after decree. There is nothing against it in S. 503—*Shanmugam* v. *Moidin*[4].

The Court delivered the following

JUDGMENT :—This is an appeal from the decree of the District Judge of South Arcot by which he removed the (defendant) appellant from his trusteeship of the Durga dedicated to Saint Hazareth Nur Mahomedsha Avulia at Panruti and the mosque attached thereto, and directed him also to pay to the trustee who would be appointed as his successor on behalf of the trust the sum of Rs. 3,052-8-3 which was found by the Judge to have been misappropriated by him, and further directed him to surrender possession of the durga and all its properties. The Judge also directed the Mahomedan Religious Endowment Committee to select a qualified person to be the trustee in succession to the appellant now removed, to whom the property was to be surrendered by the defendant.

The suit was brought by the plaintiff under S. 14 of Act XX of 1863 after having obtained the sanction under S. 18 of the Act to remove the defendant from the trusteeship and also to recover damages. The Nur Mahomedsha Avulia Durga and the mosque attached thereto are places of worship and pilgrimage for the Mahomedans residing at Panruti and in other places for which about 200 acres of land were granted by the Mahomedan Government as inam, which grant has been confirmed by the British Government. In the plaint the annual income is stated to be Rs. 3,000-0-0. The plaint states that the defendant was a trustee of the Durga and the mosque, appointed at the end of 1881 by the Religious Endowment Committee, that

1. (1886) I. L. R. 10 M. 375.
2. (1896) I.L. R. 18 A. 227.
3. (1892) I. L. R. 17 B. 388.
4. (1884) I. L. R. 8 M. 229.

he has been guilty of various acts of misfeasance and malfeasance, that he has misappropriated large sums of money and raised encumbrances for no necessity, and that, therefore, he should be removed.

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The defendant denied the various acts of mismanagement alleged against him, contended that the Durga did not fall under S. 3 of Act XX of 1863 and, therefore, the Temple Committee had no powers of superintendence over him. He pleaded that instead of having misappropriated any trust property, he had spent out of his own pocket about Rs. 10,000 for the support of the Durga which he says he is entitled to recover from the Durga estate.

Proper issues were raised in the case. The Judge decided that the plaint Durga falls under S. 3 of Act XX of 1863. He also decided that a married man is unfit to be a Jainashin and trustee of the plaint Durga according to the rules and custom prevailing therein. He found also that the defendant has been giving long leases, often mortgaging the Durga lands without any necessity. He also found that one item of property which belongs to the institution was sold by the defendant for no necessity and that the proceeds are now claimed by him as his own. He further found that the defendant has not been keeping proper accounts and that on the whole he is unfit to continue as a trustee. As to the damages claimed he found that a sum of Rs. 3,052-8-3 has been proved to have been misappropriated by the defendant, For these reasons, he passed the decree already set out.

In appeal, it is contended before us that on the evidence adduced in this case the conclusions arrived at by the lower Court cannot be supported, and that, even if the defendant is removed from the trust management, the relief that has been granted is one which could not have been granted under Act XX of 1863.

We will consider the charges separately. As to the accounts, there is no doubt that the defendant as a trustee is bound to keep proper accounts. If the Durga does not come under S. 3 of Act XX of 1863 he may not be bound to submit them to the Committee, but he is, nevertheless, bound to keep separate and clear accounts of the Durga income and expenditure. In this case the Judge appointed a Commissioner to investigate the

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accounts and submit a proper report. In his report dated the '1st December 1902, he stated thus:—"The account books filed "by the defendant cover nearly 18 years, *i. e.*, from April 1881 to "February 1899. They are all day-books with the exception of "one which is but an apology for a ledger containing a few "entries under a few heads for some months in the year 1881.

"The other books which are all day-books are eight in "number, the first six of which are of country sheets held to-"gether, like copy books, by running a thread through the middle—"so convenient that any sheet may be taken out or put in on "purpose or at pleasure; and they are from April 1881 to end of "November 1888 with intervening gaps, in some cases, of several "months for which there are no accounts. The accounts are not "closed in any year, nor is the account at the end of a book "closed and brought forward in the next book, in the case of "the first three books; and in most cases the figures are not "even totalled.

"The last two books are bound ones and are from 7th "December 1888 to 24th February 1899. The accounts of the "previous books are not closed and brought forward in these.

"Nor are these accounts confined to Durga matters. Ac-"counts of defendant's transactions with the rest of the world, "whatever their nature, and those relating to his bounty to his "relations, friends, and dependants or mendicants—in short, all, "his personal and private accounts—are jumbled up with the "Durga accounts.

"Again at the end of book I * * * * ten or "eleven entries of lump sums of over one hundred Rupees each "are made, which together make up a total of Rs. 2,788; and "they are stated to be amounts spent for litigation and Durga "festivals from 1877 to 1881. There are also other similar "entries."

The Commissioner also stated that the defendant did not appear before him, though all efforts were made to secure his presence, and in conclusion he said: "It is impossible to make "anything out of them, at all events, without a proper ledger."

On that report the Judge issued an order again to the Commissioner with reference to the allegations in paragraph 19 of the plaint. In that paragraph there was a specific allegation

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that the defendant had misappropriated Rs. 2568-13-6 without entering the same in the accounts at all, and the names of the persons were given from whom he had received that sum of money. The Commissioner was required to prepare a ledger with reference to those persons from whom various sums were alleged to have been received and misappropriated. The Commissioner submitted a report in which he pointed out that the sums received according to the oral and documentary evidence adduced before him from the ten persons named amounted to Rs. 2,020-0-5 which were not credited in the accounts, but Rs. 650 of which related to a period of time for which no accounts had been produced. Allowing in favour of the defendant that the accounts for that period, if produced, might account for that sum of money, he found that the balance of Rs. 1,370-0-5 must be taken to have been misappropriated by the defendant, so far as the receipts relating to the persons referred to are concerned. He found there were also other encumbrances now subsisting on the properties. He was also confirmed in his view of the accounts already set forth and stated that the accounts can lead only to one conclusion, *viz.*, "that the defendant has all along regarded the Durga "property and income as no other than his own private and "personal property, and himself their absolute owner, accountable " to none." During this investigation also by the Commissioner, the defendant did not appear, while the plaintiff produced witnesses and filed documents before him. Both the defendant's agent and his vakil were aware that the investigation was being carried on by the Commissioner.

The Commissioner was again directed to submit a further report with reference to matters other than those connected with the persons referred to in paragraph 19 of the plaint. In the course of that enquiry the defendant was represented by his clerk and the plaintiff by his own clerk ; and where they were not able to agree the matter was brought to the notice of the Commissioner. After that enquiry so conducted, the Commissioner submitted another report. In that report also the Commisssioner stated that his observations in the previous reports were confirmed by his fuller examination. The defendant gave to the Commissioner a statement, dated the 25th July 1903, expressing his inability to render any explanation regarding the lease or mortgage amounts of Rs. 2,020-0-5 or the sum of Rs. 1,370-0-5 mentioned in his

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previous report which was not credited in the books. From the abstract statement attached to this report it will appear that the defendant has to account for a sum of Rs. 1,682-7-10 exclusive of the sum of Rs. 1370 0-5 referred to above. The Commissioner also stated that it was not possible to find from the accounts even roughly the annual income of the plaint Durga. The Judge accepted the Commissioner's report and came to the conclusion that the accounts were not properly kept at all and directed the defendant to pay on account of the trust the two sums above referred to.

Two objections are taken before us so far as the first report of the Commissioner, in which he found that a sum of Rs. 2,020 has not been credited in the accounts, is concerned. It is argued that in coming to the conclusion that the defendant has misappropriated that sum of money he has not allowed in the defendant's favour the road cess which the plaintiff's 3rd witness, a Village Munsiff, admits had to be paid on the lands belonging to the Durga. According to that witness the road cess and the land cess came to about Rs. 150 per annum; and it is contended that for 18 years the total amount would come to about Rs. 2,700 and that as the road cess which was actually credited by the Commissioner in the defendant's favour amounted to a little over Rs. 700, credit for a further sum of Rs. 2,000 ought to be allowed to the defendant, and if so it would appear that there is no money to be accounted for by the defendant.

We are of opinion that the defendant has not proved that the sum of Rs. 2,700 has been paid for road cess and land cess. This objection was not taken before the Commissioner; on the contrary, he admitted, as we have already stated, that he had no explananation to give. The defendant could have produced receipts to show such payments to the Revenue officials. There is no evidence even now as to what the amounts were that were paid for those various years. For these reasons, therefore, we must hold that the defendant is not entitled to any credit for that sum. It is further argued that it appears from the evidence of the Commissioner himself that the account books from the year 1888 were regularly kept and, therefore, the defendant was not guilty of not properly keeping accounts. No doubt, the Commissioner says that two account-books, 7 and 8, were regularly kept. But that does not meet the objection above advanced by the Commissioner with

reference to the mode in which the defendant kept his accounts. There were no separate accounts. There were no accounts for certain periods. The defendant treated the Durga property as his own in the account books ; and the account books themselves are according to the Commissioner very suspicious. For these reasons, we are unable to say that the Judge was wrong in holding either that the accounts were not properly kept or that the defendant is liable to reimburse the sum of Rs. 1,370-0-5.

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With reference to the other item of Rs. 1,682 it is argued before us that the defendant is entitled to a certain sum of money for his maintenance and as his personal receipts are stated to be Rs. 7,681-8-7 and the disbursements on his account are stated at Rs. 9,267, a sum of about Rs. 1,582 ought to be credited in his favour, and as the amount which he is alleged to have misappropriated amounts to Rupees, 1.682-7-10, it cannot be said that he has misappropriated any amount.

There appears to be force in this contention. The Jainashin according to the evidence in this case is bound to be a celibate and he is certainly entitled to lodgings, food and raiment, and perhaps for other necessary expenses he may have to incur. There is no evidence on either side to show what a Jainashin is entitled, if at all, to take out of the income for his own use. He is certainly not entitled to use the income for the benefit of his wife and relatives as he has done in this case. While, therefore, we are not prepared to uphold the defendant's contention, we are not at the same time satisfied that he acted dishonestly with reference to this amount. That they find a place in the accounts is in his favour.

It is also contended before us that the Judge's finding on the 5th issue is wrong. It was held in O. S. No. 2 of 1889 to which the appellant was a party, that the plaint Durga falls under S. 3 of Act XX of 1863. It was the appellant who there contended that he was trustee by appointment and that the Durga was an institution of the kind contemplated by the section aforesaid. We are not satisfied that the Judge is wrong. We do not think it necessary to discuss the evidence on this point as it does not affect the main question in this case, *i.e.*, whether the defendant ought to be removed.

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That he is entitled to recover from the Durga estate the amount he has claimed, there is no reliable evidence whatever to prove. There is no evidence that requires any consideration. The Judge has found that he has no private property of his own for advancing the amount claimed for the use of the Durga.

That he claimed the proceeds of certain Durga lands as his own, is not now denied ; but it is urged that it was only done in the course of the suit.

He has also not proved the necessity for the leases for long periods and the mortgage of Durga property. The Commissioner in his report of the 27th July has stated that he expressed his inability to render any explanation.

It is then urged upon us that even on proof of these facts he ought not to be removed, but that he may be retained on conditions that may be imposed on him. We are of opinion that the defendant ought to be removed in the interests of the institution. We cannot find any reasonable excuse for the way in which the accounts are kept. It is impossible to ascertain from the accounts the income and expenditure of the Durga : they are inextricably mixed up with his own accounts, so that the Commissioner had to report a large sum of money as "undistributable" *i. e.*, which cannot be ascertained to have been received and spent on Durga or private account. He has misappropriated the sum of Rs. 1,370-0-5 and probably a larger sum which cannot now be traced. There is no explanation offered of his conduct in not appearing before the Commissioner to explain his accounts with reference to the sums received from the persons named in the plaint, which he is alleged to have misappropriated.

He claims a large sum of money from the Durga to which he is found not to be entitled, and it is evidently unsafe therefore to leave the Durga properties in his possession. We have also to bear in mind that a married man is unfit to be a Jainashin of the Durga according to usage, and according to the inam title-deed the endowment is to be continued "so long as the rules regarding celibacy etc., are conformed to."

As to the amount to be paid by him, we reduce it to Rs. 1,370-0-5 for the reasons already referred to.

Under S. 14 of Act XX of 1863 the Court may direct the removal of the trustee or manager. As the defendant is in

possession of the Durga properties as trustee and manager, on his removal, he has to be relieved of his possession of the properties. So long as he is in possession he will be treated as a trustee liable to render accounts. He is entitled to get a discharge and to be relieved of all obligations as a trustee by the Court. It is necessary therefore to direct surrender of possession. If there is any person already competent to represent the Durga, possession may be delivered to him. If the power of appointment is shown to be vested in any person, the decision in *Gyana Sambandha Pandara Sannadhi* v. *Kandasami Tambiran* [1] shows that such person may be directed to make the appointment and possession may be delivered to him. If there is no person competent to represent the trust, we see no reason why a receiver should not be appointed to take charge of the estate. Under S. 14 of Act XX of 1863 damages may be decreed against the trustee. That provision implies that the damages decreed must be paid to some person representing the trust. The order that damages should be paid and possession delivered to some specified person is necessary to give effect to S. 14. The question to whom the possession is to be transferred is an incident of the declaration that the defendant is removed from the trusteeship. On the question whether we are entitled to appoint a trustee, there is a difference of opinion between *Shephard* J. (see *Sivayya* v. *Rami Reddi*[2]) and the learned Judges who decided *Sheoratan Kunwari* v. *Ram Pargash.*[3] It is unnecessary for us to decide that question. But whether we have jurisdiction to appoint a trustee or not, we are entitled to direct a competent person to appoint a trustee and to direct delivery of possession to the person properly appointed. In this case the 2nd respondent has been appointed by the Religious Endowment Committee and possession may be properly delivered to him. The direction in the decree "that such appointment be made within two months from this date" is unnecessary. The decree which therefore the Judge has passed is in accordance with the decision in *Gyana Sambandha* v. *Kandasami.*[1] With this and the other modification above pointed out as to the amount payable, we dismiss the appeal with costs.

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1. (1886) I. L. R. 10 M. p. 375 at p. 508. 2. (1899) I. L. R. 22 M. p. 223 at p. 227
3. (1896) I. L. R. 18 A. p. 227 at p. 232.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller.

Aluvala Guruviah .. .. Petitioner* (*Accused*).

Guruviah *In re.*

Criminal Procedure Code, Ss. 131, 136—"Shall be liable to the penalty"—Failure to comply or to object—Penal Code, S. 188.

A person against whom an order under S. 133, Cr. P. C. is passed, if he neglects to take any steps whatever in respect of such order, either by way of compliance or objection in the manner provided by law, renders himself liable to be proceeded against under S. 188, I. P. C., and it is not necessary that a further notice should be given to him as provided for in S. 140 requiring him to perform the act directed by the order within a fresh period of time.

Petition under Ss. 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the Judgment of the District Magistrate of Kurnool in Crl. A. No. 21 of 1906, confirming the conviction but modifying the sentence passed by the Stationary 2nd class Magistrate of Atmakur Division in Calendar Case No. 183 of 1906.

S. Swaminadhan for petitioner.

The Public Prosecutor (*E. B. Powell*) for the Crown.

The Court passed the following

ORDER :—Dr. Swaminadhan raises two questions on behalf of the petitioner : (1) Whether the conditional order under S. 133 Criminal Procedure Code is illegal and (2) whether in the absence of the notice required by S. 140 the conviction can be sustained. The petitioner did not come forward to object to the order under S. 133 which directed him to protect his well "according to the instructions of the Local Fund Overseer." Assuming that the order is not such as is contemplated by S. 133, I do not in these circumstances think it necessary to interfere with the conviction in revision. The question whether the notice prescribed by S. 140 must be given before any punishment can be inflicted for disobedience of the order passed under S. 133 is not free from difficulty.

If the order is made absolute under S. 137 or S. 139 then clearly no punishment can follow unless the procedure laid down in S. 140 is adopted, but neither S. 137 nor S. 139 declares as S. 136 does, the liability to punishment.

The Public Prosecutor with the support of *Queen Empress* v. *Bhishambar Lal*[1] contends that whenever the time fixed in the

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* Cr. Rev. Case No. 527 of 1907. 18th March 1908.
Cr. Rev. Pet. No. 382 of 1907.

order under S. 133 has been allowed by the person against whom that order is made to pass without compliance with the order or protest against it, the liability to punishment attaches at once to that person and may be enforced irrespective of S. 140.

Both Ss. 136 and 140 impose a duty on the Magistrate; he "shall" make the order absolute and he "shall" thereupon give time for compliance with it and point out the penalty attached to disobedience. Must he then, if he enforces the penalty under S. 136, at the same time give further time for compliance with the order and threaten a further penalty for disobedience? Again if it is necessary to give warning of the penalty when a notice is issued under S. 140, should it not be equally necessary to give the same warning before enforcing a penalty for disobedience to the order under S. 133?

I have found some difficulty in finding an answer to these questions which shall be quite satisfactory, and at the hearing I was disposed to take the view presented by Dr. Swaminadhan on behalf of the petitioner, but, on consideration, I think that view does not give effect to the declaration of the liability enacted in S. 136, or to the difference between that section and Ss. 137 and 139. The view taken by the Allahabad High Court does give full effect to S. 136 and is on that account the better interpretation, and I adopt that view and dismiss the petition.

I do not know if the Magistrate contemplates further proceedings, but I think it desirable to point out that the petitioner is only bound to provide for the safety of the public so far as it is threatened by the existence of the road, and it will be the duty of the Magistrate to see if further proceedings are taken that he is not required to do more than the law requires him to do.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Arnold White, *Kt.*, Chief Justice, and Mr. Justice Miller.

Chudru Sattaya and others .. Appellants * (*Defendants.*)

v.

Marina Thinhuiah .. Respondent (*Plaintiff*).

Estoppel—Suit for mesne profits—Omission—Possession of lands on partition—Subsequent suit for mesne profits against person who was in possession.

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* S. A. 1231 of 1904. 14th March 1907.

1. (1891) I. L. R. 13 A 577.

Sattaya v. Thinhuiah

Omission to take possession of lands even when possession was offered cannot deprive the party neglecting to take possession of the right to recover the subsequent mesne profits from the party who was in actual possession of the lands.

Second Appeal from the decree of the Subordinate Judge's Court of Cocanada in A. S. No 113 of 1903, presented against the decree of the Court of the District Munsif of Coconada in O. S. No. 143 of 1901.

The lands in respect of which the mesne profits were claimed by the plaintiff fell to the share of the 1st defendant at a division between himself and the other defendants. The plaintiffs who had previously acquired an interest in the 1st defendant's share of the property instead of taking possession of the lands that fell to the 1st defendant unsuccessfully contested the propriety of the division between the 1st defendant and the other defendants. After those proceedings terminated, the plaintiff brought the present suit for mesne profits against the defendants 2 to 11 alleging that they were liable to make good the same, having been in possession of the lands that had fallen to the 1st defendant's share, during the pendency of the proceedings above mentioned.

S. Srinivasa Aiyar for *V. Krishnaswami Aiyar* for appellants.

P. Nagabhushanam for respondents.

The Court delivered the following

JUDGMENT :—The plaintiffs disputed the fairness of the division of the lands as between the 1st defendant and defendants 2 to 5, but the Court held that the division was fair. The fact that the plaintiffs did not take possession of the lands falling to the 1st defendant's share when they might have done so, does not preclude them from claiming mesne profits from the parties who in accordance with the decisions of the Courts were wrongfully in possession in 1898 and 1899.

In the lower appellate Court, the only contest was as to whether defendants Nos. 2 to 5 or defendants Nos. 6 to 11 were in possession and liable for mesne profits.

The second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present : Mr. Justice Wallis and Mr. Justice Sankaran Nair.

Shamu Patter .. .. Appellant* (*Plaintiff*).

v.

Abdul Kadir Ravuthan, and others .. Respondents (*Defendants and Legal Representatives of the 5th and 6th Defendants*).

Transfer of Property Act, S. 59—"Attest"—Mortgage—Execution. Shamu Patter v. Abdul Kadir.

A mortgage deed is not attested within the meaning of S. 59 of the Transfer of Property Act, if the witnesses are not present at the execution but affix their signatures on the acknowledgment by the mortgagor of the execution of the instrument by him.

The meaning of the word "attested" explained.

The rule is different in the case of wills in India.

Appeal from the decree of the Subordinate Judge's Court of South Malabar at Palghat in O. S. No. 26 of 1902.

P. R. Sundara Aiyar and *C. V Anantakrishna Aiyar* for appellant.

T. R. Ramachandra Aiyar and *T. R Krishnaswami Aiyar* for respondents.

P. R. Sundara Aiyar.—In this case, the execution of the mortgage was admitted; only the consideration was denied. Hence neither the factum of execution nor attestation had to be proved. You must presume that everything was regular *Jogendra* v. *Netaichurn.*[1] No issue was framed on this question till a very late stage when it ought not to have been done.

Under S. 59, T. P. A., it is writing, and not signing, that needs to be attested by the witnesses. The Calcutta cases which take the narrower view, *i.e.*, *Girindra Nath Mukerji* v. *Bejoy Gopal Mukerji*[2], *Abdulkarim* v. *Salimun*[3]; *Sasi Bhusun Pal* v. *Chandra Peshkar*[4] (in the last case, the observation is *obiter*) purport to follow two English cases *Sharp* v. *Birch*[5]; *Ford* v. *Kettle*[6] without noticing that those were under a special statute (Bills of Sale Act) which required the attesting attorney to explain the purport to the executant, thereby implying that he should be present at the execution.

* A. S. 27 of 1904. 28 January 1908.

1. (1903) 7 C. W. N. 384.
2. (1898) I. L. R. 26 C. 246.
3. (1899) I. L. R. 27 C. 190.
4. (1906) I. L. R. 33 C. 864.
5. (1881) 8 Q. B. D. 1119
6. (1882) 9 Q. B. D. 139.

Shamu Patter v. Abdul Kadir. The proper analogy is furnished by the Statue of Frauds as to Wills, S. 5—see cases collected in Bacon's Abridgment Vol. III, p. 445; *Stonehouse* v. *Evelyn*;[1] *Parke* v. *Mears*;[2] *Ellis* v. *Smith*;[3] *Grayson* v. *Atkinson*;[4] *White* v. *Trustees of the British Museum.*[5] They shew that mere acknowledgment of execution will do. This is the general law, *vide* observations of *Lord Hardwicke* in *Grayson* v. *Atkinson*[4] approved in *Body* v. *Halse*[6]; *Hindmarsh* v. *Charlton.*[7] The present Wills Act and the Indian Succession Act only embody the result of the decisions (Wills Act, S. 9; Indian Succession Act, S. 50). As to bonds see *England* v. *Roper.*[8] For the American Law, see Washerburner on Real Property, pp. 538, 539, Vol. III. At p. 292, the author says that the executant as king the witness to subscribe will do. No doubt the witnesses must be there, and must also sign *animo attestandi*—Jarman, on Wills Vol. I, p. 88 There is no general principle of law that the witnesses are to be present at the signing. [*Sankaran Nair* J.—Will acknowledgment to one do?] No. [*Sankaran Nair* J.—But in one of the English cases you find that acknowledgment to one will do.] That is, proof of acknowledgment to one will do. The English rule is analogous to the rule in S. 68 of the Indian Evidence Act. [*Sankaran Nair* J.—How is the acknowledgment to be?] It may be verbal or inferred from conduct. The contrary view would lead to great inconvenience in practice. Attestation is to the signature and not to the signing. See the definition in Bouvier's Dictionary. The American cases bear out this view. Therefore, the Bombay and the Allahabad view as laid down in *Ramji* v. *Bai Parvathi*,[9] and *Ganga Dei* v. *Shiam Sunder*,[10] respectively, is the better one.

T. R. Ramachandra Aiyar:— The object of attestation is that there should be some one to bear witness in case of dispute. The word itself implies presence. Acknowledgment might be made at a different time and might be contrary to fact. If this doctrine of attestation on acknowledgment is logically pursued,

1. (1784) 3 P. W. 254; 24 E. R. 1050.
2. 2 Bos. and Pull. p. 217.
3. (1754) 1 Vesey Junior, p. 11 30 E.R. 205.
4. (1754) 2 Vesy Senior, p. 455; 28 E.R. 291.
5. (1829) 6 Bing. N. C. p. 310.
6. (1892) 1 Q. B. 203.
7. (1861) 8 H. L. 168; 11 E.R. 39.
8. (1816) 1 Stark 304 at 310.
9. (1902) I. L. R. 27 B. 91.
10. (1903) I. L. R. 26 A. 69.

Shamu Patter v. Abdul Kadir.

it might come to this— if the witness is aware of the handwriting, acknowledgment even is unnecessary. This is the meaning given to the word in Stroud's Judicial Dictionary, by Wharton at p. 80, in Norton's Interpretation of Deeds p. 21 and in 2 Blackstone 307. The early English cases proceed on the principle of *stare decisis*. The difference in the wording of the Succession Act and Transfer of Property Act is in favour of the Calcutta view—*Sasi Bhusan Pal* v. *Chandra Peshkar*[1]

The Court delivered the following

JUDGMENTS:—*Wallis*, J.—The main question raised in this appeal is whether the provisions of S. 59 of the Transfer of Property Act which requires a mortgage to be effected by a registered instrument signed by the mortgagor and attested by at least two witnesses are sufficiently complied with when the witnesses are not present at the execution of the instrument by the mortgagor, but attest it subsequently on his acknowledgment of his signature. This question has been answered in the negative by the Calcutta Court in *Girindra Nath Mukerjee* v. *Bejoy Gopal Mukerjee*[2] and *Abdul Karim* v. *Salimun*[3] and in the affirmative by the Bombay and Allahabad High Courts in *Ramji* v. *Bai Parvati*[4] and *Ganga Dei* v. *Shiam Sunder*.[5]

As to what is meant by attesting an instrument the appellant has relied on numerous old cases under S. 5 of the Statute of Frauds of which *Stonehouse* v. *Evelyn*,[6] *Grayson* v. *Atkinson*[7] *Ellis* v. *Smith*[8] and *White* v. *Trustees of the British Museum*[9] were cited before us. In these cases, it was held that under the provisions which required a will of lands to be "attested and subscribed in the presence of the devisor by three or more credible witnesses" it was unnecessary for the testator actually to sign his will in the presence of the witnesses and that it was sufficient if he acknowledged it to be his will. This contention, however, was disapproved by many of the Judges who felt bound to follow it on the principle of *stare decisis*, and the objections to it have nowhere been more forcibly expressed than by Lord

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1. (1906) I. L. R. 33 C. 865.
2. (1898) I. L. R. 26 C. 246,
3. (1899) I. L. R. 27 C. 190.
4. (1902) I. L R. 27 B. 91.
5. (1903) I. L. R. 26 A. 69.
6. (1734) 24 E. R. 1380 3. P Wms 251.
7. (1752) 28 E. R. 291 2. Ves. Sen. 454.
8. (1754) 3 O. E. R. 205 I. Ves. Jun. 11
9. (1829) 6 Bing. N.C. 310.

Shamu Patter v. Abdul Kadir. — Wallis J.

Brougham in delivering the judgment of the Privy Council in *Casement* v. *Fulton*,[1] a case under the Indian Wills Act No. XXV of 1838. "The Statute of Frauds (29 Car. II., C. 3, s. 5), requires the will to be signed by the testator, in the presence of the witnesses; nevertheless, the construction put upon that important provision has been that an acknowledgment is equivalent to a signature. How far this latitude of interpretation was justified in principle, we need not now stop to inquire, else it might well be suggested that to do an act in the presence of a witness, and to acknowledge having done it when the witness was not present, are two entirely different things—as different as the witnessing a fact or act, and the witnessing a confession of that fact or act But it is too late to raise any such objection; we may, nevertheless, observe that the greatest Judges who have dealt with the subject have admitted the force of such considerations, and lamented the latitude given to the statutory provision by their predecessors, who first broke in upon its strictness. When Lord *Hardwicke*, in 1752, was first called upon to adopt this constuction he expressed that it had for a long while been *vexata quæstio*; but still he felt the weight of authority too great to adopt the course he manifestly inclined to.—*Grayson* v. *Atkinson*.[2] Two years after, the point was more solemnly considered in *Ellis* v. *Smith*[3] and adjudged by the same great lawyer, who then had the assistance of Sir *J. Strange*, M. R., *Willes*, C. J., and *Parker*, C. B. All these eminent men expressed their opinion, that, had the question been open, and if they were called upon now to decide it for the first time, they should not have held acknowledgments sufficient. But they found on examining the cases that the case was not *res integra*."

In the English Wills Act 1 Vict. C. 36, followed in the Indian Wills Act No. XXV of 1838 and the Indian Succession Act of 1865, S. 50, the Legislature, when intending that acknowledgment of the signature should be sufficient in the case of wills, did not think fit to leave this upon the construction placed upon the word 'attest' in the connection in which it occurs in S. 5 of the Statute of Frauds, but expressly enacted that the signature must be "made or acknowledged" by the testator in the presence of two or more witnesses, thus reproducing what

1. (1845) 3 M. I. A. 395.

2. (1752) 2 Ves. Sen. 454. 28 E.R. 291. 3. (1752) 1 Ves. Jun. 11. 30 E.R. 205

had for a very long time been understood to be sufficient in the case of wills of land, but no longer leaving it to rest on a questionable construction of the Statute of Frauds.

Mr. *Sundara Iyer* has not been able to cite to us any case not under S. 5 of the State of Frauds in which attestation was held to be sufficiently proved when it appeared that the deed was not executed in the presence of the witnesses but subsequently acknowledged before them by the maker. *England* v. *Roper*,[1] and *Parke* v. *Mears*[2] deal with proof of execution and not with proof of attestation where attestation is necessary. The meaning of the word 'attest' has often come up in regard to the execution of powers which are required to be attested, but I cannot find that it has ever been suggested that attestation of an acknowledgment of the appointor's signature would do. In *Farwell on Powers* p. 137, it is said that the term attest means "a witness shall be present to testify that the appointor has done the act required by the power." In *Burdett* v. *Spilsbury*,[3] where the opinion of the Judges was taken, Lord *Campbell* observes at p. 417: "What is the meaning of an attesting witness to a deed? Why, it is a witness who has seen the deed executed, and who signs it as a witness;" and Lord Chancellor *Lyndhurst* says similarly: "The party who sees the will executed is in fact a witness to it; if he subscribes as a witness, he is then an attesting witness." This was the meaning put upon the word in *Sharpe* v. *Birch*,[4] and by Sir *George Jessel* in *Ford* v. *Kettle*.[5] In the latter case Sir *George Jessel* says at p. 143: "What then does 'attestation' mean? It is a well known legal term. The ordinary form of attestation is 'signed, sealed, and delivered' by the person who executes in the presence of the attesting witness. That is what 'attestation' means. The thing must be done in the presence of the man who in the future will be able to testify that it was done. The authorities show that there is no attestation unless the thing is done in the presence of the attesting witness." These words afford good guidance as to the meaning to be put on the word attestation in construing an Indian statute. The decisions of the Bombay and Allahabad High Courts in *Ramji* v. *Bai Parvati*[6] and *Ganga Dei* v. *Shiam Sunder*[7] proceed on the ground that

1. (1816) 1 Stark. 304.
2. (1806) 2 Bos. & P. 217.
3. (1843) 10 Cl. and F. 340.
4. (1881) 8 Q. B. D. 111.
5. (1892) 9. Q. B. D. 139.
6. (1902) I. L. R. 27 B. 91.
7. (1903) I. L. R. 26 A. 69.

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S. 50 (cl. 3) of the Indian Succession Act which prescribes the manner in which wills must be attested requires the attesting witness either to see the testator sign or to receive from him a personal acknowledgment of his signature, and that this provision must be taken as a statutory definition of attestation applicable to other Indian Acts as well. With great respect I am unable to share this view. I do not think we should be justified in treating the provisions of S. 50 (cl. 3) of the Indian Succession Act as though they appeared in an Interpretation Act and applying them to other Acts. These provisions have a special history as already pointed out and follow the provisions of the Wills Act, I Vict. C. 36, which gave statutory authority to the construction put upon S. 5 of the Statute of Frauds, and, in my opinion, it would not be justifiable to apply them to other Acts If the legislature had intended that mortgages should be recognized in this way, they would, I think, have said so.

It is further objected on behalf of the appellant that this point was taken too late as the execution was admitted by the 3rd defendant who filed a written statement on behalf of defendants Nos. 5 to 7. The mortgagors, defendants Nos. 1 and 2, were *ex parte*, and defendants Nos. 5 to 7 were only attaching creditors. It was, therefore, necessary for the plaintiff to prove his right to a mortgage decree against defendants Nos. I and 2. This he failed to do when it was elicited in cross-examination that the attesting witnesses were not present when the mortgage was executed.

Under these circumstances the Subordinate Judge was, I think, justified in framing the further issue and deciding it for the defendants. The appeal must be dismissed with costs.

Sankaran Nair J.—The question is whether the instrument sued upon is 'attested' as required by S. 59 of the Transfer of Property Act. There are two witnesses, Chami and Sivarama Menon. Chami addmitted that he did not see the document being written or signed and that he attested it at the Sub-Registry office at the request of the mortgagee. As this was in the presence of the mortgagors to whom the mortgage amount was then paid in his presence, it must be taken to be proved that though there was no oral acknowledgment; the mortgagors in effect admitted their execution. Sivarama Menon stated that he did not know where and when the document was written, that he did

not see its execution by the 1st and 2nd defendants and that he only attested it on their admission. S. 59 of the Transfer of Property Act enacts that "a mortgage can be effected only by a registered instrument signed by the mortgagor and attested by at least two witnesses." Is this document 'attested'?

Shamu Pattar v. Abdul Kadir. — Sankaran Nair J.

It is contended before us that as the witnesses signed their names on the admission of the mortgagors of their signatures, they have 'attested' the instrument.

The word 'attest' means to bear witness to; affirm the truth or genuineness of. A person cannot be a witness to, or affirm the genuineness of, an instrument unless he was present at the execution thereof. The subsequent admission may be false. If the mental conviction of a person is enough for him to be a witness, such conviction may be produced not only by the admission of the party executing but also by other unimpeachable testimony even against the declaration of the executant. Apparently, for this reason, the attesting witness must be one who was present at the execution. So according to Blackstone's Commentaries, Vol. II. p. 307, the 'attestation' of a deed is "the execution of it in the presence of witnesses." According to Lord *St. Leonards*, the attestation should be in this form: "Signed by the abovenamed testator in the presence of us present at the same time who have hereunto signed our names"—Hand Book of Real Property. *Freshfield* v *Reed* [1] has decided that when used in an instrument "the term 'attest' manifestly implies that a witness shall be present to testify that the party who is to execute the deed has done the act." Lord *Selborne* relied upon this decision in *Seal* v. *Claridge*,[2] when he was considering the effect of the Bills of Sale Act 1878. He said: "What is the meaning of the word 'attestation' apart from the Bills of Sale Act 1878? The word implies the presence of some person, who stands by, but is not a party to, the transaction." So also *Jessel*, M. R. in *Ford* v. *Kettle*.[3] *Seal* v. *Claridge* [2] *Sharpe* v. *Birch*, [4] *Ford* v. *Kettle*, [3] are decisions on the Bills of Sale Act where the same view was taken as to the meaning of this word.

1. (1842) 9 M. & W. 404.
2. (1881) 7 Q. B. D. 519.
3. (1882) 9 Q. B. D. 141.
4. (1881) 8 Q. B. D. 114.

Shamu Patter v. Abdul Kadir — Sankaran Nair J.

On the other hand, the cases *Ellis* v. *Smith*, [1] *Grayson* v. *Atkinson*,[2] . *Stonehouse* v. *Evelyn*, [3] *White* v. *Trustees of the British Museum*,[4] have been cited to show that in decisions upon the Statute of Frauds it has been repeatedly held that the witnesses need not be present at the execution but the acknowledgment by the testator of his signature to the witnesses followed by their own signatures is sufficient and they will be treated as attesting witnesses under the section.

Lord *Campbell*, C. J., however, said of a will under S. 5 of the Statute of Frauds " that the will should be attested by the witnesses, *i.e.*, that they should be present as witnesses and see it signed by the testator " (*Roberts* v. *Phillips*)[5] and in *Bryan* v. *White*[6] Dr. *Lushington* said: " ' Attest' means the person shall be present and see what passes, and shall, when required, bear witness to the facts."

As to the decisions on the Statute of Frauds holding that an acknowledgment by the testator is sufficient for the witness to sign, I do not attach great weight to them. All the four Judges including the *Lord Chancellor* in *Ellis* v. *Smith*[1] said they were not satisfied that an acknowledgment is sufficient as it lets in inconveniences and perjuries which the Statute was designed to prevent and is destructive of those barriers the Statute erected against perjury and fraud, though they also said that it was not open to them to decide otherwise as it was not *res integra* and *stare decisis* seemed the wisest course.

The balance of English authority is decidedly in favour of adopting the natural meaning of the term.

The decisions of the Indian High Courts are not uniform. No decision of this Court has been brought to our notice. The learned Judges of the Calcutta High Court are of opinion that the witnesses must be present when the mortgage instrument is signed—see *Girindra Nath Mukerjee* v. *Bejoy Gopal Mukerjee*,[7] *Abdual Karim* v. *Salimun*,[8] *Sasi Bhusan Pal* v. *Chandra Peshkar*[9] and *Dinamoyee Debi* v. *Bon Behari Kapur*.[10]

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1. (1754) 1 Ves. Jun. 11 ; 30 Eng. Rep. 205.
2. (1752) 2 Ves. Sen. 454 ; 28 Eng. Rep. 291.
3. (1734) 3. P. Wms. 254 ; 24 Eng. Rep. 1051.
4. (1829) 6 Bing. 310.
5. (1855) 4 E. and B. 450, at p. 453, (24 L. J. (New Series) Q. B. 171.
6. 2. Rob. 315 at p. 317.
7. (1898) I. L. R. 26 C. 248.
8. (1902) I. L. R. 27 C. 193.
9. (1906) I. L. R. 33 C. 864.
10. (1902) 7 C. W. N. 60.

On the other hand it has been decided by the Bombay High Court in *Ramji* v. *Bai Parvati*[1] and the Allahabad High Court in *Ganga Dei* v. *Shiam Sundar*[2] that the attestation of a mortgage deed required by S. 59 of the Transfer of Property Act includes attestation after execution of the deed on the acknowledgment by the executant of his signature.

I agree with the Calcutta High Court. The natural meaning of the word 'attest' as I have shown is in favour of that view. A person signing a will in the presence of a testator after receiving from him a personal acknowledgment of his signature or mark 'attests' a will under S. 50 of the Indian Succession Act. The absence of a similar provision for the acknowledgment of execution in S. 59 of the Transfer of Property Act shows that attestation of the actual execution is necessary. The Bombay and the Allahabad cases decide that when the word 'attest' is expressly and in terms declared to bear a certain meaning in the Indian Succession Act, it must be taken to have the same meaning in the subsequent enactment, the Transfer of Property Act, even in the absence of any such legislative declaration ; and in fact this is the only argument advanced by the learned Judges who decided those cases. My inference is the other way. The so-called attestation based on the acknowledgment is ordinarily superfluous as evidence, as the document is registered and the executant's acknowledgment of his signature before a public officer is entitled to greater weight. A will operates only on the death of a testator and an acknowledgment by him, therefore, might perhaps be reasonably considered sufficient by the legislature as it is open to a testator at the time of the acknowledgment or subsequent thereto to make a will in the same terms without prejudice to another person's interest while in the case of a present transfer of property the law might well insist upon proof of the *voluntary* execution of the document *on the date* it purports to bear in the interests, among others, of those who might claim under grants by the executant between the date of the alleged execution and the acknowledgment. It is desirable to have proof of execution rather than proof of the executant's acknowledgment to prove such execution.

For these reasons, I would confirm the decree of the lower Court and dismiss the appeal with costs.

1. (1902) I. L. R. 27 B. 91. 2. (1903) I. L. R. 26 A. 69.

Wallis and *Sankaran Nair*, JJ.—The memorandum of objections was not argued and must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Boddam and Mr. Justice Sankaran Nair.

K. Achutayya .. Appellant and Petitioner* (*Defendant*).

v.

N. S. Thimmayya and another .. Respondents (1 *and* 2 *Plaintiffs*).

Achutayya v. Thimmayya.

Civil Procedure Code, Ss. 521, 522—Award set aside—Appeal—Appellate Court's power to go into the question of the propriety of the order of the first Court setting aside the award.

Where a Court sets aside an award and gives a decree on the merits and an appeal is preferred therefrom, the appellate Court has jurisdiction to enquire into and decide as to the propriety or otherwise of the decision of the first Court setting aside an award.

Second appeal from, and petition under S. 622 of the Civil Procedure Code praying the High Court to revise, the decree of the District Court of Kurnool in A. S. No. 98 of 1904 presented against the decree of the Court of the District Munsif of Gooty in O. S. No. 707 of 1902.

K. Narayana Rao for appellant.

T. V. Seshagiri Aiyar for respondents.

The Court delivered the following

JUDGMENT:—These cases depend upon the same question. The suit was referred to an arbitrator. The arbitrator made his award. The defendant applied under S. 521, Civil Procedure Code, to set aside the award. The award was set aside by the Munsif. Afterwards the suit came on for decision on the merits and was determined by the Munsif in favour of the defendant. The plaintiff appealed and the District Judge on appeal decided that the Munsif was wrong in setting aside the award and without going into the merits reversed the decree of the Munsif, and entered judgment in accordance with the award in favour of the plaintiff. The defendant now objects that the District Judge had no authority to go behind the decision of the

* S. A. Nos. 662 and 663 of 1905. 18th March 1908.
C. R. P. Nos. 244 and 245 of 1905.

Munsif in setting aside the award—relying upon *Ganga Prasad* v. *Kura* [1] and *Kalyan Das* v. *Pyare Lal.* [2] Achutayya v. Thimmayya.

If these cases are intended to decide and do decide that on final appeal a District Judge cannot enquire into and decide as to the propriety or otherwise of a decision of the Munsif setting aside an award they are contrary to the decisions in *Abdul Rahman* v. *Yar Muhammad*; [3] *Chattar Singh* v. *Lekhraj Singh*; [4] *Ambica Dasia* v. *Nadyar Chand Pal*; [5] *Mothooranath Tewaree* v. *Brindabun Tewaree*; [6] *Shyama Charan Pramanick* v. *Prolhad Durwani*; [7] *Damodar* v. *Raghunath*; [8] and *George* v. *Vastian Soury* [9].

We prefer to follow these latter decisions which we think are right, and we dismiss these second appeals and revision petitions with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(*FULL BENCH*).

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Wallis and Mr. Justice Sankaran Nair.

Kommineni Appayya .. Appellant*
(*3rd Defendant.*)

v.

Mangala Rangayya and others .. Respondents
(*Plaintiff and 2nd and 4th Defendants*).

T. P. A., Ss. 56, 67, 81—*"as against the seller" Marshalling as between a first mortgagee and a subsequent purchaser of one of the mortgaged properties—Mortgage decree, form of.* Appayya v. Rangayya.

A mortgagee is entitled to be paid the whole of his debt from whatever portion of the mortgaged properties he chooses; and where of two items *A* and *B* mortgaged, item *A* was subsequently purchased by another, the vendee is not entitled as of right to compel the mortgagee to proceed against item *B* before selling item *A*.

It is no doubt open to the Court to order that item *B* be sold first if the mortgagee will not be prejudiced by that course as well as to order the sale of item *A* and to stop the sale of item *A* if the sale proceeds of *B* would prove sufficient to discharge the debt. The right given to the purchaser by reason of S. 56, T. P. A., is not an equity which can be enforced to the prejudice of third parties like the prior mortgagee, but is confined to the mortgagor and his legal representatives claiming as volunteers under him.

[*Krishna Ayyar* v. *Muthukumaraswamiya Pillai* [10] explained.]

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*S. A. No. 1608 of 1904. 17th February 1908.

1. (1906) I. L. R. 28 A. 408.
2. (1907) 4 A. L. J. 256.
3. (1881) I. L. R. 3 A. 636.
4. (1883) I. L. R. 5. A. 293.
5. (1885) I. L. R. 11, C. 172.
6. (1870) 14 W. R. 327.
7. (1904) 8 C. W.N. 390, 392.
8. (1902) I. L. R. 26.B. 551.
9. (1898) I. L. R. 22M. 202.
10. (1905) I. L. R. 29 M. 217

Appayya v. Rangayya.

Second Appeal from the decree of the District Judge of Kistna at Masulipatam in A. S. No. 290 of 1904, presented against the decree of the Court of the District Munsif of Tenali in O. S. No. 263 of 1902.

The Court made the following

ORDER OF REFERENCE TO A FULL BENCH.—The facts found are as follows:—The 1st and 2nd defendants being the owner of two parcels of land mortgaged them to the plaintiff. They subsequently sold and delivered possession of parcel No. 1 of the land to the 3rd defendant, who is a *bona-fide* purchaser for value, without notice of the prior mortgage. The plaintiff now sues to recover the mortgage money by sale of the mortgaged property. The 3rd defendant contends that he is entitled to require that the plaintiff shall proceed against parcel No. 2 of the mortgaged land in the first instance, and that recourse should be had to parcel No. 1 only if parcel No. 2 is found to be insufficient to satisfy the debt due to the plaintiff. The District Munsif found that the 3rd defendant was entitled to have the assets marshalled in the manner claimed by him, and gave a decree in accordance with that finding, but the District Judge modified this by directing that parcel " No. 1 alone be sold if the decree amount is not paid within the time limited."

The question is whether, upon the above findings, the 3rd defendant is entitled to have the property marshalled and to require that parcel No. 2 shall be first sold before recourse is had to parcel No. 1.

The principle involved has been fully discussed in a number of decided cases. That reported in *Rama Raju* v. *Subbaraydu*[1] is opposed to the 3rd defendant's claim, and the same view is supported by the decisions reported in *Lala Dilawar Sahai* v. *Dewan Bolakiram*,[2] *Bhikhari Das* v. *Dalip Singh*,[3] and *Magniram* v. *Mehdi Hossein Khan*.[4]

On the other hand in the recent case of *Krishna Ayyar* v. *Muthukumaraswamiya Pillai* [5] this Court held that in a case like the present the Court would not be disposed to rely on the

1. (1882) I. L. R. 5 M 387.
2. (1885) I. L. R. 11 C. 258.
3. (1895) I. L. R. 17 A. 435.
4. (1903) I. L. R. 31 C. 95 at 101.
5. (1905) I. L. R. 29 M. 217.

authority of the above decisions, and added " that in such a case the purchaser (of a part of the property) may insist upon the mortgagee proceeding in the first instance against the mortgaged property which is in the mortgagor's hands would seem to be consonant alike with sound principle and the weight of authority (*Ghose on Mortgage*, 3rd edition, page 436)."

We think that this view is correct, and we are supported by the authority of the cases reported in *Rodh Mal* v. *Ram Harakh*[1] and *Lakhmidas* v. *Jamnadas.*[2]

In this conflict of authority and having regard to the general importance of the principle involved, we resolve to refer for the decision of the Full Bench the question stated by us above.

C. P. Ramaswamy Aiyar for appellant.

P Nagabhushanam for respondents.

P. Nagabhushanam.—The Transfer of Property Act does not directly apply but the priciple of S. 81, T. P. Act, is applicable. Before the passing of the T. P. Act, decisions made no distinction between a subsequent mortgagee and a subsequent purchaser. The present is a case of a subsequent purchaser without notice. A subsequent purchaser for value without notice is entitled to the application of the principle of marshalling in his favour—*Ghose on Mortgages*, p. 436, last para; *Story's Equity Jurisprudence*, Vol. I., para 633. [*Chief Justice.*—The only case of a purchaser after the Transfer of Property Act is *Krishna Ayyar* v. *Muthukumaraswamiya Pillai.*[3]] [*Sankaran Nair* J.—If your argument is correct, S. 56 of the T. P. Act is unnecessary.] *Raja of Vijianagaram* v. *Raja Setrucherla*[4] shows that T. P. Act is not exhaustive in the case of a 'charge.' Similarly S. 81 is not exhaustive. The case of purchasers is omitted by oversight. [*Sankaran Nair* J.—If the Act did not deal with marshalling we could adopt your argument; but where it provides for one class of cases why should we presume that the case of purchasers was omitted by oversight ?] Where a statute does not expressly negative a right, it cannot be taken away by implication—*Raja of Vijianagaram* v. *Raja Setrucherla.*[4] [*Chief Justice.*—The comments of Mr. Shephard in his notes to S. 56, T. P. Act, are against you. All these authorities

1. (1885) I. L. R. 7 A. 711.
2. (1896) I. L. R. 22 B. 804 (F. B.)
3. (1905) I. L. R. 29 M. 217.
4. (1903) I. L. R. 26 M. 686, 698, 699.

Appayya v. Rangayya.

deal with the right for contribution.] Yes; see also *Lukhmidas* v. *Jamnadas*[1]; *Krishna Ayyar* v. *Muthukumaraswamiya.*[2] [*Chief Justice.*—The question of third parties' rights for marshalling does not seem to have risen in *Krishna Ayyar* v. *Muthukumaraswamiya.*[2]] It did in a way and the principle is stated at p. 219. [*Wallis* J.—It is a case of a plea of contribution and not marshalling. You have nothing but a dictum in *Krishna Ayyar* v. *Muthukumaraswamiya*[2] in your favour. The dictum in *Lala Dilawar Sahai* v. *Dewan Bolakiram*[3] is against you.] [*Chief Justice.*—A dictum based on a passage in *Ghose* who does not quote any English authority for the principle which he says exists in England. Is there any English case in your favour?] *Avenall* v. *Wade*;[4] *Highes* v. *William.*[5] [*Wallis* J.—That simply shows the origin of S. 81.] *Bhikhari Das* v. *Dalip Singh*,[6] *Ramaraju* v. *Subbarayudu*[6]; *Beni Prosad Sinha* v. *Rewatt Lall*[7] are against my contention. [*Sankaran Nair* J.—Why do you not ask for a decree in this suit against the mortgagor under S. 56, T. P. Act?] The Court will give it.

The respondent was not called upon.

The Court delivered the following

OPINION.—The plaintiff, mortgagee, sues to recover his money by sale of the properties mortgaged, which consist of two parcels of land of which item No. 1 is in the possession of the 3rd defendant, a *bona fide* purchaser for value without notice of the plaintiff's prior mortgage. The 3rd defendant, appellant, contends that the plaintiff is bound to proceed first against the property, item No. 2, not sold to him and his property No. 1 should be sold only for the balance, if any.

Under S. 67 of the Transfer of Property Act the plaintiff is entitled to an order that the properties mortgaged be sold and S. 88 of the same Act provides that the Court shall pass a decree that in default of the defendant paying the mortgage amount, the mortgaged property or a sufficient part be sold and the proceeds applied in discharge of the plaintiff's claim.

A second mortgagee of one of the properties mortgaged without notice of the 1st mortgage is entitled under S. 81 of the

1. (1896) I. L. R. 22 B. 304.
2. (1905) I. L. R. 29 M. 217.
3. (1885) I. L. R. 11 C. 258.
4. (1835) 46 R. R. 220.
5. (1852) 42 E. R. 423.
6. (1882) I. L. R. 5 M. 387.
7. (1897) I. L. R. 24 C. 746, 749.

by such sale, *it* may be open to the Court to direct in the decree itself its sale before the other property. Appayya v. Rangayya.

Further, in execution of a decree for the sale of both parcels, parcel No. 1 may be sold first, and if the sale proceeds are sufficient to discharge the plaintiff's debt, the sale of No. 2 may be stopped.

Whether the 3rd defendant's claim under S. 56 of the Transfer of Property Act may not be enforced in this suit by passing a decree which will enable the 3rd defendant to sell item No. 2 and have the sale proceeds appropriated by the Court in discharge of the plaintiff's claim before the expiry of the period for the payment of the plaintiff's debt, after which alone the plaintiff could apply for sale, is a question which has not been referred to us or argued before us. The more limited question whether the District Judge was right in passing a decree directing item No. 1, the parcel purchased by the 3rd defendant, to be sold before item No. 2, has also not been referred to us or argued before us.

Our answer to the question referred is in the negative.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Sankaran Nair.

Vishvendra Thirthaswami .. Appellant*
(*1st Defendant.*)

v.

Vishnumurti Bhatta and others .. Respondents.
(*Plaintiffs*).

Limitation Act, Art. 148—Mortgage—Redemption—When the right to redeem accrues. Vishvendra Thirthaswami v. Vishnumurti Bhatta.

A mortgage was executed in 1828 and was made redeemable at the end of any native year from that date The present suit for redemption was brought in 1902. *Held* that the suit was barred.

Second Appeal from the decree of the District Court of South Canara in A. S. No. 326 of 1903, presented against the decree of the Court of the District Munsif of Udipi in O. S. No. 514 of 1902.

The suit was one for redemption of a mortgage of 1828. There was a question as to the exact terms of the mortgage. In 1839, plaintiffs' predecessor had brought a suit alleging that the

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* S. A. 506 of 1905. 17th February 1908.

mortgage deed provided that it was redeemable at the end of any native year within 15 years. The suit was dismissed on the ground that there was no tender or deposit proved. Ex. *A* and *B* were the original and appellate judgments in that case. Ex. *C* *E*, *F*, *G* purported to be copies of the defendant's pleader's statements wherein they contended that the suit was not maintainable within 15 years, while agreeing with the statement as to the terms of the document made by the plaintiff. The copies were not certified to be correct. There was no evidence as to their having been compared with the original. In some of them there were the words "compared—Court volunteer copyist" above date 1839. The further question was whether even if the terms were as was asserted by the plaintiff's predecessor in 1835, the suit brought in 1902 was barred.

P. R. Sundara Aiyar and *B. Sitarama Rao* for appellant.

K. Ramanath Shenoi for respondents.

P. R. Sundara Aiyar:—Exhibits *C*, *E*, *F* and *G* are not certified copies, nor are they examined copies sworn to by the person who compared them. There is no evidence that they have been compared with the original. S. 90, Evidence Act, does not apply to copies—even if it does, there is no presumption under that section as to the truth of the facts recited in the document Accuracy is to be proved. *Krishna Kishori* v. *Kishori Lal*,[1] *Appathura Pattar* v. *Gopala Panikar*[2] show that S. 114, Evidence Act, has no application to documents. Even supposing they are evidence, the mortgage is redeemable at the end of any year within 15 years. Under Art. 148, Limitation Act, time would begin to run from the end of the first year. Periodical right is provided for in Art. 131. That article does not apply to this case. The right of redemption under the document is not a recurring right. It is a right which accrued at the end of the first year, but which could be exercised thereafter only at stated intervals, or rather, as put in *Chinnasamy Reddiar* v. *Krishna Reddi*[3] the mortgage is redeemable at any time but possession is to be delivered only at the stated period. Because plaintiff has got an option to sue or not, limitation does not cease to run. Limitation begins to run from the happening of the earliest event on the happening of which he is entitled to sue—*Reeves* v. *Butcher*;[4]

1. (1887) I. L. R. 14 C. 486 (P.C.)
2. (1901) I. L. R. 25 M. 674.
3. (1906) 16 M. L. J. 146.
4. (1891) 2 Q. B. 509.

Vishvendra Thirthaswami v. Vishnumurthi Bhatta.

Hemp v. *Garland*;[1] *Sitabchand Nahar* v. *Hyder Malla*.[2] Art. 75, Limitation Act, makes an exception to the general rule.

Ramanath Shenoi:—The copies purport to be by an officer of the Court and purport to have been compared. They are old documents. They are to be presumed to have been properly compared. Even of public documents, any secondary evidence may be given if they are lost—*Kalandan* v. *Kunhunne*.[3] *Mercer* v. *Denne*[4] shows that presumption may be made. Limitation begins to run only at the end of the period of optional redemption. Right of redemption and foreclosure must be taken to be co-extensive—*Raghubar Dayal* v. *Bhikya Lal*[5]; *Vadju* v. *Vadju*[6]; *Tirugnana* v. *Nallatambi*.[7] *Rose Ammal* v. *Rajarathnam Ammal*[8] proceeds upon special facts. [*Sankaran Nair* J.:—It is a question of construction in each case.] The view that limitation begins to run at the end of the first year will lead to an absurdity, *e. g.*, when the period limited is less than the limitation period. [*Sankaran Nair* J.:—It is as if a party specifically contracted for a right to redeem even after the right for redemption might be barred.] The defendant's predecessor himself asserted that the mortgage was not redeemable within 15 years His construction agrees with the recital in Ex. *A* and ought to be accepted against the defendant.

B. Sitarama Rao in reply:—The copies not being certified copies, the signatories ought to be proved to be officers of Court. Ex. *B* is conclusive on the question of construction.

The Court delivered the following

JUDGMENT:—Assuming that the documents, Exhibits *C*, *E*, *F* and *G*, are admissible in evidence for the purpose of proving the mortgage sued on and the provisions thereof, as to which we express no opinion, we are not prepared to say they negative the evidence afforded by Exhibit *B* (the judgment of the appellate Court in a suit in 1839 on the mortgage in question) which is admissible under Ss. 74 and 90 of the Evidence Act, and which shows, as the Munsif finds, that the mortgage deed provided that the plaintiff might redeem at the end of any year

1. (1843) 4 Q. B. 519.
2. (1896) I L. R. 24 C. 281
3. (1882) I. L. R. 6 M. 80
4. (1904) 2 Ch. 534.
5. (1885) 12 C. 69.
6. (1880) I. L. R. 5 B 22.
7. (1892) I. L. R 16 M. 486.
8. (1898) I. L. R. 23 M. 33.

Vishvendra Thirthaswami v. Vishnumurthi Bhatta.

within 15 years. The only evidence in this case consists of the statements in exhibits *A* and *B* of the predecessor in title of the plaintiff and the statement in Exhibit *E* of the predecessor in title of the defendant, and we cannot accept the statement in Exhibit *E*, of the defendant's predecessor in title as against the plaintiff's own statement in Exhibit *B*. In view of the special provisions in the mortgage deed it is not necessary for us to consider the question of construction (with regard to which conflicting views have been taken) which arose in *Vadju* v. *Vadju*[1] and *Raghubar Dayal* v. *Bhikya Lal*[2] on the one side and in *Chinnasawmy Reddiar* v. *Krishna Reddi*[3] and *Rose Ammal* v. *Rajaratnam Ammal*[4] on the other.

Having regard to the terms of the instrument in question, the plaintiff has failed to show that his right to redeem only arose within 60 years of the date of the institution of his suit.

We must set aside the decrees of the Courts below and dismiss the suit.

Having regard to the position which the parties took up in the suit of 1839, we direct that each party bear his own costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis.

Aiyathurai Ravuthan .. .. .. Appellant* (2nd Defendant).

v.

San.Muhamad Meera Ravuthan and others.. Respondent (*Plaintiffs and 1st Defendant.*)

Aiyathurai Ravuthan v. Meera Ravuthan.

C. P. C., Ss. 28, 26—Misjoinder of parties defendants—" In respect of the same matter "—Suit by assignor of mortgage against mortgagor and assignee for a mortgage decree against the mortgagor and in the alternative a personal decree against the assignee.

Per *Benson* and *Wallis* J.J. :—(Chief Justice *dissentiente*)—A suit by the assignee of a mortgage against the mortgagor and his assignor (the mortgagee) for a mortgage-decree in the first instance against the mortgagor for the whole amount mentioned in the mortgage, and, in the alternative, for a money-decree against the assignor (mortgagee) in respect of the amount that may be proved to have been received by him subsequent to the assignment and a mortgage-decree in respect of the balance is not bad for misjoinder of defendants.

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* S. A. No. 1550 of 1904. 25th February 1908.

1. (1880) I. L. R. 5 B. 22.
2. (1885) I. L. R. 12 C. 69.
3. (1906 16 M. L. J. 146.
4. (1898) I. L. R. 28 M. 83.

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Per *Wallis* J. :—The words "in respect of the same matter" in S. 28 indicate that claims to relief might be joined in one suit against several defendants whether they constituted separate causes of action or not, so long as they are in respect of the same matter.

The scope of S. 28 is wider than that of English rule 4, O. XVI, and English decisions under rule 4 are not applicable to S. 28, C. P. C.

Obiter :—English decisions on rule 1, O. XVI, are applicable to cases of joinder of plaintiffs under S. 26, C. P. C.

Second Appeal from the decree of the Court of the Subordinate Judge of Madura (West) in A. S. No. 238 of 1904 presented against the decree of the Court of the District Munsif of Dindigul in O. S. No. 297 1903.

K. Ramachandra Aiyar for appellant.

Sir *V. C. Desikachariar* for respondent.

The case first came on before their Lordships *the Chief Justice* and Mr. Justice *Benson*.

The Court delivered the following

JUDGMENTS :—*The Chief Justice* :—In this case the plaint alleges that the 1st defendant executed a mortgage to the 2nd defendant to secure moneys due by the 1st defendant to the 2nd defendant; that the 2nd defendant assigned the mortgage to the plaintiff; that the plaintiff gave notice of the assignment to the 1st defendant and demanded payment, and that the 1st defendant stated he had paid Rs. 200 to the 2nd defendant. The 1st defendant's case is that he paid the Rs. 200 to the 2nd defendant before the latter assigned the mortgage to the plaintiff. The 2nd defendant denies this alleged payment. The plaintiff asked for a decree for the amount due under the mortgage and for sale of the mortgaged property as against both defendants.

The District Munsif held the suit was bad for misjoinder. The Subordinate Judge held there was no misjoinder. The plaintiff is, of course, not entitled to the relief for which he asked, *viz.*, a mortgage decree against both defendants; but the lower appellate Court gave him a decree on the mortgage as against the 1st defendant and a decree for Rs. 200 as against the 2nd defendant.

Although the plaintiff does not expressly claim the Rs. 200 in the alternative from the 1st or 2nd defendant, in substance his claim is for a mortgage decree for the amount mentioned in the

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mortgage as against the 1st defendant if the Rs. 200 has not been paid off, and in the alternative, if the Rs. 200 had been paid off, for a mortgage decree for the amount mentioned, less the Rs. 200, as against the 1st defendant, and for Rs. 200 by way of damages as against the 2nd defendant.

The question of misjoinder turns on whether the plaintiff's right to relief is alleged to exist as against the two defendants in respect of the same matter within the meaning of S. 28 of the Code of Civil Procedure. The plaintiff's alleged right of relief as against the 1st defendant is a right of relief based on the mortgage. His right of relief as against the 2nd defendant would seem to be damages for the breach of an implied covenant that the debt due on the mortgage was outstanding at the date of the assignment, or damages for the fraudulent suppression of the fact that Rs. 200 due on the mortgage had been paid off. In *Muthappa Chetty* v. *Muthu Palani Chetty*[1] it was held that on the true construction of S. 28, two distinct causes of action could not be joined against two defendants in one suit, and I see no reason to doubt that that decision was right. If in the present case the cause of action alleged against the 1st defendant is distinct from that alleged against the 2nd, I think the suit is bad for misjoinder. As regards *Meyappa Chetti* v. *Periannan Chetti*[2] which was cited to us, speaking for myself, I should find some difficulty in following it. It seems to me that in that case there were two distinct causes of action against two defendants. In *Serajul Huq Khan* v. *Abdul Rahaman*[3] there would seem to have been, as the Court pointed out, only one cause of action—*viz.*, the dispossession of the plaintiff.

I think the District Munsif was right, and I would allow the appeal and restore the decree of the District Munsif.

Benson J. :—The facts being as stated by the learned Chief Justice, I am of opinion that relief is sought as against both defendants in regard to the same matter, and that both defendants may be sued in one suit under S. 28, Civil Procedure Code, and judgment may be given against either or both according to their respective liabilities.

One chief object of the section is to avoid multiplicity of suits and the risk of inconsistent decisions in several suits arising

1. (1903) I. L. R. 27 M. 80. 2. (1905) I. L. R. 29 M. 50.
3. (1902) I. L. R. 29 C. 257.

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out of the same matter, that is, as I take it, out of the same transaction or connected series of transactions constituting the cause of action against each defendant. The present case indicates how easily the Courts might be led to give inconsistent decisions if the pleas of the two defendants were tried separately and on different evidence in each suit. It is obviously convenient and in the interests of justice to try the whole matter in one suit. The case is similar in principle to that of *Meyappa Chetti* v. *Periannan Chetti*[1] from which the case of *Muthappa Chetty* v. *Muthu Palani Chetty*[2] is distinguished.

There is, in my opinion, no misjoinder and the second appeal must be dismissed with costs.

The Chief Justice:—Under Ss. 575 and 587 of the Code of Civil Procedure an order is made referring the appeal to a third Judge.

The Second Appeal was accordingly posted before *Wallis* J.

K. Ramachandra Aiyar for appellant:—*Muthappa Chetty* v. *Muthu Palani Chetty*[2] is in my favour. *Meyappa Chetty* v. *Periannan Chetty*[1] does not dissent from it, but only distinguishes it. Even if it is against me, it does not notice *Smurthwaite* v. *Hannay*[3]; see also *Sadler* v. *Great Western Ry. Company.*[4] It is no good referring to cases prior to the House of Lords cases. See *Thompson* v. *London County Council*[5] and the remarks of *A. L. Smith* L. J. therein. Again *Sheshа Ayyar* v. *Krishna Ayyangar*[6] says that a claim on a mortgage cannot be combined with any other claim.

Sir *V. C. Desikachariar* for respondent:—The presence of the transferor was essential in my interests. Accounts had to be adjusted in his presence. Order XVI, r. 4, is similar to S. 26, but they both differ in their wording from S. 28; I mean order XVI, r. 4, as interpreted in *Smurthwaite* v. *Hannay.*[3] [*Wallis* J. —The Chief Justice in *Muttappa Chetty* v. *Muthu Palani Chetty*[1] is of opinion that if at all, the English rule is wider than S. 28.] The point of it is the difference in the wording of Ss. 26 and 28. That has not been sufficiently noted by the learned Chief Justice. [*Wallis* J.—I have never been able to understand the difference.] There is no hardship in not permitting

1. (1905) I. L. R. 29 M. 50.
2. (1903) I. L. R. 27 M. 80.
3. (1894) A. C. 494.
4. (1896) A. C. 450.
5. (1899) 1 Q. B. 840 at 842.
6. (1900) I. L. R. 24 M. 96.

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several plaintiffs to join in respect of different causes of action. but if defendants were not so allowed to be joined there might be real hardship. There would be multiplicity of actions and possibly inconsistent decisions. *Meyappa Chetty* v. *Periannan Chetty*[1] is more in point than *Muthappa Chetty* v. *Muttu Palaniappa Chetty*[2] though I cannot support the judgment in the latter; *Meyappa Chetty's case*[1] follows *Rajadur Chowdhry* v. *Kalikrishna Bhattacharya*[3]; *Buddree Doss* v. *Hoare Miller & Co.*[4] which again follows *Child* v. *Stenning*[5] and is a decision of *Wilson* J. [*Wallis* J.—An authority on the Judicature Act, no doubt, but it is before the House of Lords' decision.] The Chancery practice has not been affected thereby. Expediency also is in favour of this liberal construction. [*Wallis* J.—But that argument did not weigh with the House of Lords.] *Mudun Mohan Lal* v. *Holloway*[6]; *Mowji Monji* v. *Kuverji Nanaji*[7] are also in my favour. The observations of *Cockburn* C. J in *Honduras Ry. Co.* v. *Lefevre*[8] apply to this case. In. C. R. P. 63 to 69/06 *Miller* J. follows *Meyappa Chetty* v. *Periannan Chetty.*[1]

K. Ramachandra Aiyar in reply:—The old cases are no longer authorities. The Indian cases follow the old decisions.

His Lordship delivered the following

JUDGMENT:—In this case as pointed out in the judgment of the learned Chief Justice the transferee of a mortgage has brought a suit for sale against the mortgagor and has joined therewith a claim against his transferor the original mortgagee for damages in case it should appear that any portion of the mortgage debt had been discharged by the mortgagor before the date of the transfer and so not be recoverable in the present suit from the mortgagor. The question is, is such a joinder of defendants and causes of action permissible, and this again appears to me to depend on the question whether the decision against allowing such a joinder in *Muthappa Chetty* v. *Muthu Palani Chetty*[2] or the contrary decision in *Meyappa Chetty* v. *Peirannan Chetti*[1] should be followed. The decision in *Muthappa Chetty* v. *Muthu Palani Chetty*[2] proceeded upon the authority of English cases, and the chief question in my opinion is, are these cases applicable ?

1. (1905) I. L. R. 29 M. 50.
2. (1903) I. L. R. 27 M. 80.
3. (1881) I. L. R. 8 C. 963.
4. I. L. R. 8 C. 170.
5. (1877) 5 Ch. D. 695.
6. (1886) I. L. R. 12 C. 555.
7. (1907) I. L. R. 31 B. 516.
8. (1877) 2 Ex. D. 301.

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The law as to joinder of parties and causes of action embodied in Ss. 26, 28 and 46 of the Civil Procedure Code is borrowed with modifications from the rules in Orders XVI and XVIII of the Civil Rules of Practice under the Judicature Act. These Rules again are largely derived from the provisions of the Common Law Procedure Act, 1852 and 1858 which modified the rigour of the rules of pleading at Common Law. The history of these changes is lucidly traced in the well known judgment of Lord Justice *Bowen* in *Hannay* v. *Smurthwaite* [1] which was approved by the House of Lords in *Smurthwaite* v. *Hannay*[2]. Ss. 26 and 28 of the Civil Procedure Code reproduce the language of Rules 1 and 4 of Order XVI as to joinder of plaintiffs and defendants with this modification that, whereas Rules 1 and 4 as originally framed provided for the joinder of plaintiffs or defendants in or against whom the right to any relief was alleged to exist, S. 26 expressly provides that in the case of joinder of plaintiffs, the relief must be "in respect of the same cause of action" and S. 28 that in the case of joinder of defendants the relief must be "in respect of the same matter." Now it was decided by the House of Lords in *Smurthwaite* v. *Hannay* [2] under Rule 1 as it originally stood that plaintiffs could only be joined in respect of the same cause of action and that the Rule did not permit several causes of action by several plaintiffs to be joined against the same defendant; that is to say, Rule 1 was interpreted as confined to cases in which relief was sought "in respect of the same cause of action," so that the introduction of the words "in respect of the same cause of action" into S. 26 did not really make any difference, and therefore English decisions on Rule 1 are applicable to cases of joinder of plaintiffs under S. 26. It does not, however, follow that English decisions as to Rule 4 are applicable to cases of joinder of defendants under S. 28.

Although the decision in *Muthappa Chetty* v. *Muthu Palani Chetty* [3] may perhaps be supported on the ground that the facts in that case were not such as to admit of the joinder of defendants there attempted on any view of S. 28, yet the decision proceeds on the authority of *Sadler* v. *Great Western Railway Company* [4] in which it was held by the House of Lords that a plaintiff could not under Rule 4 join separate causes of action against different

1. (1893) 2 Q. B 412.
2 (1894) A. C. 494.
3. (1903) I. L. R. 27 M. 80.
4. (1896) A. C. 450.

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defendants in one suit. With great respect I am of opinion that English decisions on the scope of Rule 4 are not necessarily applicable to cases in India coming under S. 28. These decisions treat Rule 1 and Rule 4 as not concerned with joinder of causes of action at all but merely with joinder of parties. The fact, however, that under the Civil Procedure Code joinder of plaintiffs is only permitted when the relief is claimed in respect of the same cause of action, while in the case of defendants joinder is permitted when the relief is claimed in respect of the same matter goes, in my opinion, to show that it was not intended to restrict the joinder of defendants to cases in which relief is sought in respect of the same cause of action, and if this had been the intention, the words " in respect of the same cause of action " would have been used in S. 28 as well as in S. 26. The use of the less definite words " in respect of the same matter " in S. 28 would seem to show that it was intended to allow joinder of defendants not only when relief was sought in respect of the same cause of action, but also when relief is sought in respect of separate causes of action against the different defendants so long as they all arise " in respect of the same matter." The inconveniences of allowing defendants only to be joined in respect of the same cause of action in the strict sense and the consequent multiplicity of suits and failure of justice that must often result are forcibly pointed out by *Lindley* M. R. in *Fankenburg* v. *Great Horseless Carriage Company*[1] where the Court of Appeal put a liberal construction upon the term " cause of action " for the purpose of avoiding such inconveniences. Any other decision would, it is there pointed out, have revolutionised the practice of the Chancery Division. This, in my opinion, explains why the words " in respect of the same cause of action" in S. 26 are replaced by " in respect of the same matter " in S. 28, the intention being that claims to relief might be joined in one suit against several defendants whether they constituted separate causes of action or not so long as they were " in respect of the same matter " That the words " in respect of the same matter" in S. 28 are wider than the words " in respect of the same cause of action " has been pointed out by Sir *Bhashyam Aiyangar* J. in *Dampanaboyina Gangi* v. *Addala Ramaswami*.[2] If S. 28 is wider than S. 26, it is also wider than Order XVI, Rule 1 as it originally stood, and is also wider than Rule 4 which has been

1. (1900). I. Q. B 504.
2. (1902) I. L. R. 25 M. 736 at 740.

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held to be as restricted as Rule 1 with regard to joinder of causes of action. The conclusion follows that English decisions under Rule 4 are not applicable to S. 28, Civil Procedure Code, as the scope of the section is wider than that of the rule. The decision in *Muthappa Chetty* v. *Muthu Palani Chetty* [1] proceeds on the view that the English decisions as to the scope of Rule 4 must govern cases under S. 28, Civil Procedure Code. If this is not so and the English decisions on Rule 4 can be treated as inapplicable, the present case presents no difficulty and there is a uniform course of decisions in favour of allowing joinders such as that in the present case so long as the relief is sought "in respect of the same matter"—*Buddree Doss* v. *Hoare Miller and Co.*[2]; *Rajdhur Chowdhry* v. *Kalikrishna Bhutta Charjya*[3]; *Madan Mohun Lal* v. *Holloway* [4] which two cases closely resemble the present; *Meyappa Chetti* v. *Periannan*[5] and *Mowji Monji* v. *Kuverji Nanaji*[6].

For these reasons, I agree with the conclusion arrived at by *Benson* J. and dismiss the second appeal with costs. The 2nd defendant must pay the 1st defendant's separate costs of the appeal in this Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis and Mr. Justice Sankaran Nair.

Subramania Aiyar .. .. Appellant * (*1st Defendant*).

v.

S. A. Subramania Aiyar and others .. Respondents (*Plaintiffs, 2nd defendant, etc.*).

Subramania Aiyar v. Subramania Aiyar.

Interest Act XXXII of 1839—Hindu Law on the subject of Interest—When to be invoked.

In order to bring a case under the provisions of the Interest Act, two things are essential: namely (1) an agreement or usage to pay interest and (2) a demand in writing.

The Hindu Law is not binding on the courts on questions of liability to pay interest.

Appeals from the decree of the Subordinate Judge's Court of Tanjore in O. S. No. 31 of 1901.

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* A. Nos. 135 and 144 of 1904. 10th January, 1908.

1. (1893) I. L. R. 27 M. 80.
2. (1881) I. L. R, 8 C. 170, 171.
3. (1882) I. L. R. 8 C. 963.
4. (1886) I. L. R. 12 C. 555.
5. (1905) I. L. R. 29 M. 50.
6. (1907) I. L. R. 31 B. 516.

Subramania Aiyar. v. Subramania Aiyar.

H. Lubeck for appellant.

P. R. Sundara Aiyar and *V. Purushotham Aiyar* for respondents.

The Court delivered the following

JUDGMENT :—As regards the question of interest, we think the appellants were not entitled to any interest before the filing of the plaint as there was no agreement to pay interest and no demand in writing to bring the case within the provisions of the Interest Act. On this point, we are not prepared to differ from the decision in *Kamalammal* v. *Peeru Meera Levvai Rowthen.*[1] As regards the recent case of *Saunadanappa* v. *Shivbasawa*[2] which awarded interest on the ground that the parties were Hindus and that it was according to Hindu usage to pay interest in such cases, it has been settled in this Court, ever since the case of *Annaji Rau* v. *Ragubai*[3] that Hindu law is not binding in such matters as the payment of interest.

The appeal must, therefore, be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Munro.

Srimanth Raja Erlagudda Mallikarjuna Prasada Naidu Bahadur Zemindar Garu .. Petitioner* (*Plaintiff*).

v.

Moolupuri Pappaya .. .. Respondent. (*Defendant*).

Mallikarjuna v. Papayya.

Madras Acts—Rent Recovery Act, S. 7—Dispensation of putta not to be inferred from mere acceptance of muchilikka.

The mere acceptance by the landlord of a muchilika executed by the tenant is not sufficient proof that the puttah has been dispened with.

[*Varatha Chari* v. *Balu Naiken*4 ; *Narayana* v. *Mani*5 referred to.]

Petition under S. 25 of Act IX of 1887, praying the High Court to revise the decrees of the Additional District Munsif of Masulipatam in S.C.S. Nos. 90 to 133, 136, 138 and 139 of 1905 and petitions under S. 623, C. P. C., praying the High Court to revise the decrees of the District Judge of Kistna at Masulipatam in A. S. Nos. 189 to 204 and 237 of 1906, presented against the decrees of the Additional District Munsif of Masulipatam in O. S. Nos. 43 to 46, 48 to 59 of 1905 and 47 of 1905.

P. R. Sundara Aiyar, for appellant.

The Advacate-General (*P. S. Sivaswami Aiyar*) for respondent.

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*C. R. P. Nos. 327 to 373 of 1906 and 378 to 394 of 1907. 7th January, 1908.

1. (1897) I. L. R. 20 M. 481. 2. (1907) I. L. R. 31 B. 354.
3. (1871) 6 M.H.C.R. 400. 4. (1881) I.L.R. 3 M. 255. 5. (1886) I.L.R. 10 M. 36

The Court delivered the following

JUDGMENT :—With regard to the rent of fasli 1313 these civil revision petitions are not pressed. It is contended that as the tenant executed the muchilika, Exhibit *A*, for fasli 1308 to 1312 inclusive and the landlord accepted it, it was not necessary for the landlord to tender any puttah as it is to be inferred that both parties agreed to dispense with puttah. Mallikarjuna v. Papayya.

We do not think any such inference can be drawn in this case. In the first place it was not the landlord's case in the Courts below that there was any agreement to dispense with a puttah; on the contrary, in paragraph 6 of the plaint it was stated that a puttah was prepared in accordance with the muchilika for 5 years and actually tendered to the tenants, but refused by them. In the second, place we are not prepared to hold that the mere acceptance by the landlord of a muchilika executed by the tenant is sufficient proof that puttah has been dispensed with—*Varathachari* v. *Balu Naiken*[1] and *Narayana* v. *Muni.*[2]

As there was no agreement to dispense with pattah, the provisions of S. 7 of Act VIII of 1865 were not complied with and the suits are rightly dismissed. We dismiss these civil revision petitions with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White, *Kt.*, Chief Justice, and Mr. Justice Miller.

L. Angannayya and others .. Appellants*
v. (*Defendants.*)
Daroor Narasanna and others .. Respondents
(*Plaintiff and other Defendants.*)

T. P. A., S. 43—Transfer of inam land—Inam inalienable—Subsequent enfranchisement, effect of. Angannayya v. Narasanna.

In the absence of any reservation in a transfer deed, the transfer of the land which is the subject of an inam, involves the transfer of the inam also, whether the inam be regarded as a grant of land or as the remission of the assessment thereon.

If an inalienable inam is transferred and the inam is subsequently enfranchised, the transferee is entitled to claim the land enfranchised by reason of S. 43 of the Transfer of Property Act.

Any transfer of a village service inam is wholly null and void by reason of Reg VI of 1831.

Held also that a statement in the transfer deed that the lands were sold to the vendor amounted to a representation by him that he was entitled to transfer it within the meaning of S. 43, T. P. A.

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* S. A. No. 95 of 1906. 17th December 1907.

1. (1881) I. L. R. 3 M. 2 55.
2. (1886) I. L. R. 10 M. 363.

Angannayya v. Narasanna

Second Appeal from the decree of the District Court of Kurnool in A. S. No. 16 of 1904 presented against the decree of the Court of the District Munsif of Gooty in O. S. No. 455 of 1902.

S. Swaminadhan for appellants.

T. V. Seshagiri Aiyar for respondents.

The Court delivered the following

JUDGMENT :—There is no doubt that the Courts were entitled to hold, as they have held, that the land sold under the decree, was land in Survey No. 695-C and not in Survey No. 695-B. In so holding they have not gone behind the decree, which was ambiguous. Nor have we been shown that they have gone behind the sale proclamation.

The next question is whether the 1st defendant had any interest in the land which he could mortgage to the plaintiff. The land was classed as Village Service Inam and was sold in 1889 by the 2nd defendant : the Inam was enfranchised or resumed in 1891, and the land was mortgaged to the plaintiff in 1892. Whether we regard the Inam as a grant of the land or as a remission of the assessment payable on the land, it is clear that if the land is transferred the Inam is transferred, unless in the transfer the Inam is reserved ; and it is not suggested that there was any such reservation in this case. Any transfer of Inam forming the emoluments of Village officers and servants is by Regulation VI of 1831, which was in force in 1889, null and void, and it seems that the alienation as a whole must be null and void, for it is not easy to see how it can be possible to alienate the land and reserve the benefit of the right to withhold the payment of the assessment payable thereon.

But when the land was enfranchised or fully assessed about 1891, it became alienable, and the 1st defendant then, and the plaintiff claiming through the 1st defendant, subsequently, became entitled to require that the transfer should operate on the alienable interest acquired by the 2nd defendant. Dr. *Swaminadhan* cited the case of *Ramasami Naick* v. *Ramasawy Chetty*,[1] against this view, but that, as is pointed out in the judgment, was not a case to which S. 43 of the Transfer of Property Act could be applied.

1. (1907) I. L. R. 30 M. 255.

Here the 2nd defendant purported to transfer certain immovable property, and his statement in Exhibit *A* that the Inam sold had fallen to his share, amounts to a representation that he was authorized to transfer them. The case is, therefore, within the section and the appeal has to be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair.

Subramaniya Othuvar ... Petitioner* (*Petitioner-2nd Defendant*).

v.

Munusawmi Pillai .. Respondent (*Respondent-Plaintiff.*)

Subramaniya v. Munusawmi.

C. P. C., S. 622—*Erroneous decision on a question of law—Revision*

The decision of a Court that an award was not bad on the ground that the arbitrator had drafted the plaint for one of the parties, the other party not having been aware of the same until after the award, though perhaps erroneous, is not liable to be set aside in revision under S. 622, C. P. C.

Petition under S. 622 of the Civil Procedure Code praying the High Court to revise the order of the District Munisiff's Court of Srivaikuntam dated 6th May 1907, in O. P. No. 1241 of 1907 (O. S. No. 253 of 1906.)

The Advocate-General (*P. S. Sivaswami Aiyar*) and *V. Purushotthama Aiyar* for appellants.

K. Srinivasa Aiyangar for respondent.

The Court delivered the following

JUDGMENT:—It is argued before me that the Munsif acted illegally and without jurisdiction in confirming the award when the arbitrator was a pleader who had drafted the plaint, a fact of which the petitioner was not aware before the award was made. The Munsif evidently did not think this was a sufficient reason, because he says that the pleader did not act for the plaintiff and that he is a respectable vakil of the High Court. I am not able to say that he acted illegally or without jurisdiction in coming to this conculsion. The Munsif may have been wrong on a question of law. But that is not a reason for this Court to interfere.

A preliminary objection is also raised that no civil revision petition lies. I do not decide it.

The petition is dismissed with costs.

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* C. R. P. No. 504 of 1904. 5th March 1908.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis and Mr. Justice Munro.

Acchabba Beori and others .. .. Appellants *

(*Prisoners* 1 *to* 7 *and* 9 *to* 12).

v.

King-Emperor .. .. .. Respondent.

Acchabba Beori v King-Emperor

Cr. P. C, S. 27—Charge to jury—Misdirection—Omission to tell the jury the effect of Ss. 25, 26., Evidence Act—Confessions, directions about.

It is a misdirection to tell the jury generally that confessions to the Police if followed by the production of stolen property is admissible, without more: omission to point out that such confessions are only admissible in so far as they relate distinctly to the fact thereby discovered vitiates the trial.

Where there are more than one accused, the jury should be warned to take, and deal with, the case of each accused separately, and a confession of one involving himself alone cannot be used against the others.

Appeal from the sentence of the Court of Session of the South Canara Division in Cases Nos. 35 and 36 of the Calendar for 1907.

The Public Prosecutor (*E. B Powell*) for the Crown.

The Court delivered the following

JUDGMENT:—We think a new trial must be ordered in this case on the ground of misreception of evidence and misdirection. The Sessions Judge allowed the 17th prosecution witness to give hearsay evidence as to the guilt of the 4th accused and also recorded alleged confessions by accused Nos. 4 and 12 made when they were in the custody of the police. The Sessions Judge also misdirected the jury, in our opinion, in telling them that confessions to the Police if followed by the production of stolen property were admissible, whereas he should have pointed out that such confessions are only admissible in so far as they relate distinctly to the fact thereby discovered.

Evidence of such confessions should not be allowed to be given or recorded to any greater extent, nor when such evidence as is properly admissible has been recorded, should the jury afterwards be told generally that the prisoners had confessed, as has been done in this case.

Further the Sessions Judge did not warn the jury to take the case of each accused separately and that a confession by one accused involving himself alone, could not be used against the other accused.

We set aside the conviction and direct the prisoners to be retried.

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* Cr. A. No. 778 of 1907. 24th February, 1908.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis and Mr. Jusice Miller.

N.P.N.M. Chidambaram Chettiar .. Appellant *
(*Petitioner*).

v.

The Tinnevelly Sarangapani Sugar Mills Company, Ld., represented by its Official Liquidator Mr. F. S. Clark .. Respondent
(*Respondent*).

Chidambaram Chettiar v. Clark.

Contract Act, S. 221—Lien of Agent—Company—Winding up of—Effect of winding upon lien—Companies Act, S. 149.

S. 149 of the Companies Act does not authorise a Court to deprive a secured creditor of possession of his security; and consequently if an agent of the company is entitled to remain in possession by virtue of a lien under S. 221 of the Contract Act, the making of the winding-up order will not affect his right to remain in possession and continue to make the necessary disbursements. Disbursements made between the date of the winding up order and that of the handing over of possession stand on the same footing as the disbursements made prior to the winding up order, and the agent is entitled to a lien in respect of both.

Held also that on a construction of the agreement between the agent and the company, there was nothing in it to exclude the operation of S. 221 of the Contract Act.

Appeal from the order of the District Court of Tinnevelly, dated 13 December 1906 in Interlocutory Application No. 342 of 1906 in M. P. No. 265 of 1903.

K. Srinivasa Aiyangar for appellant.

K. Ramanatha Shenoi for respondent.

The Court delivered the following

JUDGMENT :—We do not think that there is anything in the agreement between the petitioner and the Company to exclude the operation of S. 221 of the Indian Contract Act. In so far as the expenditure incurred before the winding up order comes within that section the appellant is entitled to a lien. The District Judge was therefore wrong in refusing to recognise this lien which operated on the properties and goods in his possession at the date of the winding-up order. S. 149 of the Indian Companies Act does not authorise a Court to deprive a secured creditor of possession of his security; but we understand that in this case possession was given up under the order of the Court dated the 5th December, 1905, without prejudice to the petitioner's

* A. A. O. No. 6 of 1907. 18th October 1907.

Chidambaram Chettiar v. Clark.

right. If the petitioner was entitled to remain in possession by virtue of a lien under S. 221 of the Indian Contract Act, the making of the winding-up order would not affect his right to remain in possession and continue to make the necessary disbursements. The subsequent disbursements are stated to have been made between the date of the winding-up order and the handing over of possession. These disbursements, in our opinion, stand on the same footing as the disbursements made prior to the winding-up order

We must, therefore, set aside the order of the District Judge and remand the case to him for the purpose of deciding what sum should be allowed in respect of disbursements subsequent to the winding-up order, and also for the purpose of deciding what property the appellant was in possession of, as agent, when dispossessed by the Court, and what amount he is entitled to as lien on such property under S. 221 of the Indian Contract Act. Fresh evidence may be taken. The appeal is allowed with costs here and in the lower Court. Costs will be paid out of the estate.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis and Mr. Justice Munro.

Bahubalendrani Guruvaraju .. Appellant* (*Petitioner.*)

v.

Bahubalendrani Chandrasakara Raju by guardian Gopinatha Tripathi .. Respondent (*Counter-petr.*).

Guruvaraju v. Gopinatha Tripathi.

Succession Certificate Act, Ss. 19. 3—Appeal from Vizagapatam Agent's order—Madras Act XXIV of 1839, S. 3, Rule X, Cl. 4—"District Court"—"District Judge."

The Agent to the Governor in Council at Vizagapatam is the judge of the principal Civil Court of original jurisdiction in the Agency, and consequently the Court over which he presides is a District Court within the meaning of S. 3 of the General Clauses Act.

An appeal lies under S. 19 of the Succession Certificate Act from the order of the Agent.

[*Chakrapani v. Varahalamma*[1] dissented from.]

Appeal from the order of the Court of the Agent to the Governor at Vizagapatam in C. M. P. No. 2 of 1906.

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* A. A. O. No. 1921 of 1907. 19th February 1908.

1. (1894) I. L. R. 18 M. 227.

B. Sitarama Rao for *V. N. Kuppu Rao* for appellant.

C. R. Tiruvenkatachariar for respondent

The Court delivered the following

JUDGMENT:—It is urged that there is no appeal in this case under S. 19 of the Succession Certificate Act from the order of the Agent to the Governor at Vizagapatam, as it is contended that the Agent is not a District Court and the decision in *Chakrapani* v. *Varahalamma*[1] is referred to. Mr. Thiruvenkata Chariar has, however, very properly called our attention to the definition of District Judge in the General Clauses Act, 1868, which was in force in 1880 when the Succession Certificate Act was passed.

In S. 2 (12) " District Judge " is defined as the Judge of a Principal Civil Court of Original Jurisdiction.

We think under S. 3 of the Act XXIV of 1839 and Rule X, Clause 4, of the Rules framed pursuant to that Act, the Agent is the Judge of the Principal Civil Court of Original Jurisdiction in the Agency. In S. 3 of the Succession Certificate Act " District Court" is defined as a Court presided over by a District Judge. Consequently, under S. 19, Succession Certificate Act, an appeal lies from the Agent's order as from an order of a District Court.

In *Chakrapani* v. *Varahalamma*[1] this provision of the General Clauses Act appears to have been overlooked, and we are unable to follow it. The objection must be overruled.

As to the merits in order to ascertain the title of the petitioner it would have been necessary for the Agent to go into the pedigree filed by the petitioner as supplemental to his petition in accordance with the Agent's direction.

This would have involved a lengthy and complicated inquiry, and we think, under these circumstances, the Agent was justified in not going into the pedigree and dismissing the petition.

The appeal is dismissed with costs.

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1. (1894) I. L. R. 18 M p. 227.

Bangaramma v. Bramhazee.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis and Mr. Justice Sankaran Nair.

Surampalli Bangaramma .. Appellant* (*Plaintiff*).
v.
Surampalli Bramhazee .. Respondent (*Defendant*).

Hindu Law—Widowed daughter-in law—Maintenance, suit for—Plea in defence that the widow did not live with the husband during his life time, not good.

A Hindu wife who without sufficient cause left her husband and lived apart from him during his lifetime does not forfeit her right to maintenance against the ancestral estate in the hands of her father-in-law after her husband's death, provided she is not otherwise disqualified thereto, *e.g.*, by unchastity, etc.

Per *Wallis* J. :—But it is open to the Court to have regard to her conduct in so having separated from the husband, in fixing the amount of her maintenance. It is the right and also the duty of a Hindu wife to return to her husband after separation from him.

Per *Sankaran Nair* J.— *Obiter.*—The husband is under a moral obligation to maintain his wife though living apart. He is bound to support her though he should have no property at all and, if she quits him without any adequate excuse, he is not in law bound to maintain her.

The right to maintenance is one accruing from time to time; and a widow's right to it depends upon her wants and exigencies. The obligation of a Hindu husband to maintain the wife is quite distinct from that of the father-in-law to maintain a widowed daughter-in-law, and the fact that she did not live with her husband while alive is no answer to a claim for maintenance against the father-in-law in possession of the ancestral property, on the husband's death.

Appeal from the decree of the District Court of Vizagapatam in O. S. No. 22 of 1903.

P. R. Sundara Aiyar and *V. Ramesam* for appellant.

T. R. Ramachandra Aiyar and *T. Ramachandra Rao* for respondent.

The Court delivered the following

JUDGMENTS :—*Wallis* J :—The question we are called upon to decide in this case is whether a wife who, without sufficient cause, leaves her husband and lives apart from him during his life-time forfeits her right of maintenance against his estate after his death.

It is undoubtedly the duty of a Hindu wife to live with her husband and under his protection, and if, without due cause, she leaves him and lives apart she cannot claim to be maintained by him.

There is, however, no authority for saying that after leaving him she has no right to return and live under his protection.

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* A. No. 118 of 1904. 22nd January, 1908.

Bangaramma v. Bramhazee. — Wallis J.

Hindu Law does not recognise any divorce or dissolution of the marriage tie, and in the absence of clear authority to the contrary, I am of opinion that it is her right and also her duty to return to her husband. I am not referring to cases of unchastity which is not alleged here. If she is entitled to be maintained by her husband during his life-time on her returning to him, it appears to follow that her right to maintenance is only suspended so long as she goes on committing a breach of her duty by living away from him. After his death it is no longer possible for her to live with him and she is not committing any breach of duty in failing to do so. Consequently there is nothing to prevent her from enforcing a widow's claim to maintenance. It might not be an unreasonable rule to punish the misconduct of a Hindu wife in leaving her husband without due cause by depriving her of her right to maintenance either during his life or after his death, and if there were any such well-established rule we should, of course, be bound to enforce it. It is not, however, in my opinion, the function of this Court to create such a rule, and that no such rule now exists is clear to my mind from the failure of the respondent's Vakil to produce any direct authority in support of the same.

It is, however, in my opinion, open to the Court to have regard to the conduct of the widow in fixing the amount of her maintenance, and I am inclined to think that under the circumstances of this case it should be fixed at a less liberal rate than would otherwise be awarded. Under the circumstances, I think an allowance of Rs. 7/- a month will be sufficient. The decree of the lower Court must be set aside and decree given for the plaintiff from the 15th March 1903, the amount to be payable on the 1st of every month with proportionate costs throughout.

Sankaran Nair J.—This is an appeal from the decree of the District Judge of Vizagapatam, dismissing the plaintiff's suit brought by her to recover arrears of maintenance from the defendant, her father-in-law, who is found by the Judge to be in possession of ancestral property, on the ground that up to the moment of her husband's death she was not in a position to claim maintenance from him as she was living apart without any sufficient cause, and that her husband's death cannot place her in a better position.

Bangaramma v. Bramhasee. — Sankaran Nair J.

It is not alleged that the plaintiff was unchaste or that her conduct was otherwise improper. It is also not contended that she was bound to live with the defendant.

It is true that the plaintiff claims maintenance from her father-in-law on the ground that he has taken the property of her deceased husband. But I am not aware of any rule of Hindu law that a widow is entitled to maintenance out of the property in the possession of a member of her husband's family only if she would have been entitled to claim maintenance from the person whose property is now vested in such member.

In that case a widow who had no legal claim to maintenance against the father-in-law who had no ancestral property could acquire none against the heir who takes his assets. But it has now been held by all the High Courts that the father-in-law is under a moral obligation which ripens into a legal one against his assets in the hands of his heir to maintain his daughter-in-law.

In Madras it has further been held that the rule of non-liability established with reference to the self-acquired property of the father-in-law ought not to be extended to other property which may not be liable for partition at the instance of the husband as ancestral property; for instance, property acquired from a maternal grand-father—see *Rungammal* v. *Echammal and others.*[1] The texts collected in *Savitribai* v. *Lukshmibai and Sadasiv Ganoba*[2] seem to show that the husband is under a moral obligation to maintain his wife though living apart. If so the decision above referred to would support her claim.

As the father-in-law is under a moral obligation to maintain a daughter-in-law who lives apart, without any sufficient excuse but without any corrupt motives, and who may have been living apart from her husband, there is no reason why the possession of ancestral estate which converts it into a legal obligation should impose conditions on the exercise of the widow's claim. That such moral obligation at least exists cannot now be denied. (See the cases referred to in *Rungammal* v. *Echammal and others.*[1])

There is also no doubt that the plaintiff would have inherited any self-acquired property of the husband. The right to maintenance is one accruing from time to time.

1. (1898) I. L. R. 22 M. 307.   2. (1878) I. L. R. 2 B. 597.

Bangaramma v. Brambazee. — Sankaran Nair, J.

It depends upon her wants and exigencies. The liability to maintain her arises from various considerations. The right of a wife to maintenance is a matter of personal obligation. It rests on the identity arising from the marriage relations and is not dependent on the possession of any property by the husband. He is bound to support her though he should have no property at all. Her home is in her husband's house, and if she quits him without any adequate excuse, he is not in law bound to maintain her obviously for the reason that she thereby disqualifies herself from performing her duties to him. There is no reason, therefore, why the plaintiff should not have been entitled to maintenance from the husband on returning to him or offering to return.

A widow's right rests on different considerations. While it has been held that she is entitled to maintenance from the son even if he is not in possession of ancestral property—*Subrayan* v. *Subbakka*[1]—a similar right against the father-in-law is not admitted. His legal obligation to maintain her out of ancestral property is not now denied. That obligation became enforceable on her husband's death. His moral obligation is due to the fact that the plaintiff by her marriage with his son "was born again in his family," in the language of the Hindu lawyers, and his legal liability arises on account of his possession of joint family property.

That obligation cannot be discharged and her claim defeated by reason of her conduct towards her husband which might disentitle her to enforce a distinct claim arising out of a different relation, and on account of considerations peculiar to that relation she has not ceased to be a member of the family.

We are, therefore, of opinion that her claim to maintenance must be allowed.

As to the rate I am of opinion that Rs. 7 would be sufficient to provide for her in the style to which she is likely to be accustomed, and such payment would not be an undue burden on the defendant.

We declare her right to maintenance at that rate and award her that amount from the 15th March 1903, the date of her registered letter (Exhibit *III*) by which she demanded maintenance. The amount will be payable on the 1st of every month. She will be entitled to her proportionate costs throughout.

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1. (1884) I. L. R. 8 M. p. 236.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White, *Kt.*, Chief Justice, and Mr Justice Miller.

Marri Ramanna and another .. Appellants * (*Defendants*).

Ghattamaneni .. . .. Respondent (*Plaintiff*).

Ramanna v. Ghattamaneni

Tenancy in common—Ouster—Damages.

An assignee of the interest of one of several co-sharers is entitled to all the rights of the assignor, but if the assignee be ousted from exclusive possession of any part of the undivided share, the assignee cannot recover damages for the same.

Second Appeal from the decree of the District Court of Kristna at Masulipatam in A. S. No. 339 of 1904 presented against the decree of the Court of the District Munsiff of Gudivada in O. S. No. 60 of 1903.

P. Nagabhushanam for appellants.

T. V. Seshagiri Aiyar for respondent.

The Court delivered the following

JUDGMENT:—The case set up by the plaintiff in his plaint is a right to exclusive possession of the property leased to him by Kottappa's widow, *viz.*, one half of the family property.

The findings are that the 1st defendant was not divided from his family, and consequently, as against him, the plaintiff was, of course, not entitled to exclusive possession of any portion of the family property.

On appeal to us this is conceded, but it is now contended that the first defendant being merely entitled to joint possession with the plaintiff of the family property, he was not entitled to oust the plaintiff, and it was argued that the plaintiff was entitled to damages on the footing that as regards one-third of the family property, the ousting of the plaintiff by the 1st defendant was wrongful.

We agree with Mr T. V. Seshagiri Aiyar that the plaintiff is entitled to the same right as the deceased Kottappa would have had if he had been alive, but Mr. Seshagiri Aiyar has cited no authority to support his proposition that although the plaintiff claimed exclusive possession of a specific portion of the family

* S. A. No. 208 of 1905. 23rd January 1908.

property as against a member of a family from whom he was undivided, he was, if ousted from his exclusive possession, entitled to receive damages on the footing that the ousting was wrongful as regards his interest in the property as an undivided member of the family.

Ramanna v. Ghattamaneni.

However, as we have pointed out, this was not the plaintiff's case.

We think the Munsif was right, and we accordingly set aside the decree of the lower appellate Court and restore that of the Munsif with costs here and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Munro.

Audipuranam Pillay ... ... Appellant* (*Petitioner and plaintiff*).

v.

Gopalasamy Mudaly and others. Respondents (*Respdts.*, 1-7 *defndts.*, *and supl. defendants* 8 *and* 9).

T. P. A., Ss. 88, 93—Decree for sale—Time fixed for payment, effect of—Payment after time but before completion of sale—Mortgagor's rights—Mortgage decree for sale—No conversion into decree for foreclosure—Interest, rate of—Mortgage decree, form of.

Audipurnam Pillay v. Gopalasamy Mudally.

The mortgagor (judgment-debtor) in a suit for sale on the mortgage is entitled to stop execution by payment of the debt at any time before the completion of the sale. The execution sale is not finally complete until the defendant has had an opportunity of obtaining its rescission, under S. 310-A, C. P. C.

The mortgagor judgment-debtor is under no necessity of showing good cause for not paying within the time fixed in the decree.

The ruling in *Vallabha Valia Rajah* v. *Vedapuratti*[1] should not be extended in its operation to suits for sale against the mortgagor.

Obiter :—A sale may, under Ss. 88 and 92, T.P.A., be ordered in lieu of foreclosure in a suit for foreclosure or redemption, but a decree for sale cannot be converted into one for foreclosure.

The time limit fixed in a decree for sale for payment of the mortgage money is primarily and principally a restriction on the mortgagee decree-holder by staying his hands from executing the decree.

A decree for sale under S. 88, T. P. A, is a final decree and all subsequent proceedings are proceedings in execution, and to them the provisions of the Civil Procedure Code are, so far as they may be applicable, to be applied.

The mortgage bond in the case provided that the mortgagee was to take the usufruct, *i.e.*, the annual melwaram for the principal. *Held* that the mortgagee in possession was entitled only to the court rate of interest on the principal amount from the date fixed for payment and not to the melwaram of the property under the mortgage.

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* A. A. O. Nos. 25 & 26 of 1907. 12th March 1908.

1. (1895) I. L. R. 19 M. 40.

Audipurnam Pillay v. Gopalasamy Mudaly.

Appeal from the orders of the Subordinate Judge's Court of Tanjore 1907, and in E. A. Nos. 2436 and 2429 of 1906 and E. P. No. 240 in O. S. No. 58 of 1905.

The Advocate-General (*C. Sankaran Nair*) for appellant.

T. Subramania Aiyar and *K. Srinivasa Aiyangar* for *P. S. Sivaswami Aiyar* and *V. Krishnaswami Aiyar*, with *T. V. Gopalaswami Mudaliar* and *S. Muthia Mudaliar* for respondents.

The Court delivered the following

JUDGMENT:— The plaintiff holding an usufructuary mortgage dated the 27th August 1901, containing a covenant to pay, sued for sale on his mortgage and, on the 16th December 1905, obtained a decree in the usual form fixing a term of 6 months for payment of the money due and directing a sale in default of payment. The mortgagors did not pay on the date fixed for payment, the 16th June 1906, but some months later, on the 22nd November 1906, paid the principal money into Court with an application in the form of an application for execution of a decree and obtained delivery of possession of the mortgaged property. Till then, the mortgagee remained in possession but had not, when he was ousted, applied for an order for sale under S. 89 of the Transfer of Property Act.

He refused to receive the money and now contends that the Court had no power in execution proceedings to permit the mortgagors to pay it into court and to direct delivery of possession to them, they not having paid on or before the 16th June 1906.

Now according to the view taken by the majority of a Full Bench of this Court in *Mallaikarjunadu Setti* v. *Lingamurthi Pantulu, etc.*[1] a decree for sale under S. 88 of the Transfer of Property Act is a final decree, and all subsequent proceedings are proceedings in execution of that decree, and to them the provisions of the Civil Procedure Code are, so far as they may be applicable, to be applied.

Unless, then, there is something in the decree to debar him from so doing, the judgment-debtor is entitled to stop execution by payment of the debt at any time after the decree has been passed and before the execution sale is complete and it is not finally

1. (1902) I. L. R. 25 M. 244 at p. 282.

complete until he has had his opportunity of obtaining its rescission under S. 310-*A* of the Code.

Audipurnam Pillay v. Gopalasamy Mudaly.

As was pointed out by *Geidt* J. in *Bibijan Bibi* v. *Sachi Bewah*[1] the decree for sale does not debar the mortgagor of any right in default of payment, the only penalty affixed to the default is the liability to have the property sold. In this view the mortgagor was entitled to pay the money, and the fact that his application took the form of an execution petition should not make any difference in the result.

The learned Advocate-General, however, contended, if we understood him aright, that the provision of the decree which directs that in the event of payment in due time the property be reconveyed and delivered to the defendant is a decree or order in the defendant's favour, and the defendant is therefore to that extent a decree-holder within the meaning of S. 2 of the Code of Civil Procedure. The decree or order which he holds is a decree or order for redemption, and his application for delivery on payment is an application for execution of that decree or order, and his case is, therefore, governed by the decision of the Full Bench of this Court in *Vallabha Valia Rajah* v. *Vedapuratti*[2] where it was held that a mortgagor who has obtained a decree for redemption cannot apply for the execution of the decree after the time limited. The time limit fixed in the decree is in a suit for sale primarily and principally a restriction on the plaintiff. He is to stay his hands for 6 months and may then execute as if he held a simple decree for money by sale of certain property of the defendant. The provision for delivery of possession in the event of payment in time, may well be regarded as merely laying down the condition on which he is to receive payment and not as a decree or order in favour of the defendant, but, if it is to be regarded as a decree or order, what follows?

On failure to pay on the day fixed, the defendant has lost his right to redeem his property in execution of the decree or order in his favour But it has to be remembered that he is a decree-holder in spite of himself, an involuntary decree-holder, and it is not easy why the plaintiff who has chosen to obtain this decree for him, should be enabled by doing so not only practically to foreclose his right of redemption but also to deprive him of the right

1. (1904) I. L R. 31 C. 863. 2. (1895) I. L. R. 19 M 40.

Audipurnam Pillay v. Gopalasamy Mudaly.

which the law gives him as judgment-debtor. He did not seek for the decree and he does not want the decree and so he does not execute the decree. He thereby loses the privileges of a decree-holder which his creditor has thrust upon him but he does not thereby lose his rights as judgment-debtor to pay the debt into the execution court and require satisfaction to be entered up.

To place the defendant in a suit for sale in the same position as regards default in payment as the plaintiff in a suit for redemption in which the decree directs a sale in default of redemption within the time limited involves, it seems to us, an anomaly unless we can apply to his case all the provisions of S. 93 of the Transfer of Property Act. The defendant in a suit for sale though forced to redeem against his will has not, unless that section can be extended to him, the right to ask the Court to postpone the day fixed for payment, though that right is given by S. 93 to the successful plaintiff in a suit for redemption, who in most cases may choose his own time for instituting his suit.

It has been held by Sir *Bhashyam Ayyangar* J. in *Mallikarjunadu Setti* v. *Lingamurthi Pantulu*,[1] etc., that the Transfer of Property Act ought to have provided for an application for postponement by a defendant in a suit in order to meet the case in which payement is not made by the defendant within the time limited and the mortgagee does not choose to apply for an order for sale under S. 89. But it seems to us unnecessary to hold that the Legislature which was careful to provide for postponement in cases of suits for foreclosure and redemption failed to perceive that a similar provision might be desirable in suits for sale. It is easier, we think, to take the view that such a provision was found to be unnecessary in a suit for sale, the reason being that once a decree is passed the defendant can pay at any time before the sale is completed. There is no necessity to give him in this respect any advantage which is not given to judgment-debtors in suits for money. He is in fact one way better off; as he is a judgment-debtor he can come in at any time before sale without showing good cause before his payment is permitted.

In his judgment in *Vallabha Valia Rajah* v. *Vedapuratti*[2] *Shephard* J. notices the hardship which may ensue if the rules

1. (1902) I. L. R. 25 M. at p. 282. 2. (1895) I. L. R. 19 M. 40.

laid down in that case are to be applied in suits for foreclosure, and declines to express an opinion whether they ought or ought not to be applied in those cases.

We think, therefore, that we are justified in confining the operation of that case to suits to which it actually applies, that is to say, to cases in which the mortgagor is the successful plaintiff in a suit for redemption; and the more so perhaps in that the reasoning on which is based the decision of the Full Bench in *Vedapuratti* v. *Vallabha Valia Raja*[1] renders it at least doubtful whether a suit for redemption could be maintained by a mortgagor who has failed as defendant in a suit for sale on the same mortgage. If this cannot be done by the mortgagor then the mortgagee may in many cases convert at his option his decree for sale into a decree for foreclosure, a course which is not contemplated by the Transfer of Property Act. Sale may under Ss. 88 and 92 be ordered in lieu of foreclosure in a suit for foreclosure or redemption, but there is no provision for conversion of a decree for sale, into a decree for foreclosure. But even if *Vallabha Valia Raja* v. *Vedapuratti*[2] be applied to the case of a defendant in a suit for sale it can only be applied to him *qua* decree-holder and his rights as judgment-debtor are not, as we have shown, affected by it.

The mortgagor then was entitled to pay the money into the Court executing the decree when he did, in satisfaction of the decree, and he was clearly not bound to sue for possession in a separate suit.

His claim is to enforce his right to possession which raised questions relating to the satisfaction of the decree and raised it between the parties to the suit, and by S. 244, Code of Civil Procedure, the Court executing the decree was the proper Court to determine it. It is not contended that it has been wrongly determined.

There remains the question of interest. By the mortgage the plaintiff was to take the usufruct, that is to say, the annual melwaram for his interest; and if paragraph 3 (*d*) of the plaint correctly sets out the conditions of the deed in this regard, the mortgagors were entitled to redeem only in May of each year by which month the harvest would be over and melwaram ascertained and collected.

1. (1902) I. L. R. 25 M. 300; F. B. 2 (1895) I. L. R. 19 M. 40.

Audipurnam Pillay v Gopalasamy Mudaly.

The plaintiff, however, put an end to the contract by suing and obtaining his decree and the learned Advocate-General did not make it clear on what principle his client could, in those circumstances, claim the whole melwaram for the year whereof he held possession for only a part. The decree does not direct the mortgagor to redeem only in the month of May.

The learned Advocate-General laid stress on the fact that the crops were grown by his client, but the affidavit on which he relies shows that he only means that the mortgagee had made advances to the ryots, and these, it is to be presumed, he can recover out of the kudivaram. There is certainly no reason why they should be repaid to him out of the melwaram.

It will be just, in the circumstances of the case, to allow him the melwaram as from June to November inclusive or half the melvaram of the year as interest for the period until the money is paid. According to the affidavit of Natesa Pillay dated the 5th December 1906 the amount payable to the plaintiff would then be Rs. 2,150, one moiety of Rs. 4,300, as the kist would, we imagine, fall to be paid after November by the mortgagor. The amount of Rs. 4,300 is between 14 and 15 per cent. on Rs. 30,000, —very heavy interest considering the nature of the security.

We must, therefore, unless the parties agree to adopt this or some other figure, direct an enquiry and finding as to the amount and value of the melvaram realised for the agricultural year 1905-1906.

These appeals having been again posted to be spoken to, the Court passed the following

ORDER :—The parties have not arrived at an agreement and we heard argument again as to the amount to be awarded as interest. We think, on consideration, that the usual Court rate of 6 per cent. should be allowed as interest on the principal from the date fixed for payment in the decree as the 16th June 1906 to the date of payment into Court, namely the 17th November 1906 and 6 per cent. on that sum from the 17th November to the date of payment. Parties will pay and receive proportionate costs throughout.

There will be no costs in C. M. A. No. 26 which is dismissed in consequence of the decision in C. M. A. No. 25. In C. M. A.

No. 25 costs will be calculated on the amount of the claim Rs. 30,000.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Miller

Dorasawmy Pillay .. .. Appellant*
v. (*Plaintiff*).
Angammal and others .. .. Respondents
(*Defendants*).

C. P. C., S. 28—"Same matter"—Joinder of defendants.

Plaintiff, a minor, sued on attaining majority, his guardian, the 2nd defendant, impleading defendants 1 and 3 to 8 as persons in possession of property wrongfully sold to some of them by the guardian, the 2nd defendant.

Dorasawmy v. Angammal.

Held.—That the suit was rightly framed and that there was no misjoinder.

Appeal from the decree of the District Court of South Arcot in O.S. No. 28 of 1903.

J. L. Rosario for appellants.

The Advocate-General and *T. Richmond* for respondents.

The Court delivered the following

JUDGMENT:—The District Judge has dismissed this suit on the preliminary ground that there is misjoinder of defendants and causes of action, but he has not stated what the causes of action are, which have been improperly joined. We do not think that there is any misjoinder. S. 28 of the Civil Procedure Code directs that all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, in respect of the same matter.

In the present suit, the cause of action arises from the malversation of the 2nd defendant in regard to the plaintiff's property of which he was the guardian and the plaintiff's right to have an account of his property and to recover it. The allegation in paragraph 11 of the plaint is that the property, items Nos. 1 to 7 in Schedule *G*, were purchased in the name of the 1st defendant with property which belonged to the plaintiff, and that these items were in the possession of the defendants Nos. 1 and 2 and were afterwards wrongfully sold to defendants Nos. 5 to 8 and are now in the possession of defendants Nos. 4 to 8. The right to relief against defendants Nos. 1 and 4 to 8 and against defendant No. 2

* A. No. 189 of 1904. 18th February 1908.

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and his son, the 3rd defendant, in regard to these items, exists in respect of the same matter, and they may be jointly sued. We think, too, that more inconvenience would result from bringing separate suits than from dealing with the whole matter in one suit.

We, therefore, set aside the decree of the District Judge and direct him to restore the suit to his file and to dispose of it according to law. Cost will abide the event.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.]

Present :—Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble and Sir Arthur Wilson.

Hansraj and others .. Appellants.*

v.

Sundar Lal and another .. Respondents.

and

Hansraj and others .. Appellants.

v.

Dwarka Das and another .. Respondents.

and

The Secretary of State for India in Council—Intervenant.

Hansraj v. Sundar Lal & Dwarka Das.

C. P. C., Ss. 522, 506—Arbitration—Award—Appeal—Objections—Alleged misconduct of the Arbitrator—Dismissal of objections—Decree in accordance with the award—Incompetency of appeal from such a decree.

No appeal lies against a decree passed in terms of the award made on reference to an arbitration under S. 506, C. P. C., on the ground of misconduct on the part of the arbitrator, except in so far as the decree is in excess of, or not in accordance with the award.

Objections such as those filed by the appellants in the case are more or less frivolous and are not misconduct within the meaning of that expression in the Chapter on Arbitration in the Civil Procedure Code.

No. 39 of 1905. Appeal from a decree of the Chief Court of the Punjab affirming a decree of the District Judge of Delhi.

The principal question involved in the appeal was the competency of an appeal from a decree made in accordance with an award.

The parties to the litigation were all members of the same family and their relationship to each other is shown in the following pedigree:—

* 18th March 1908.

Saudagar Mal.

Jhanda Mal. — Beni Pershad. — Dwarka Das.

(sons of Beni Pershad:) Hansaraj. — Amar Singh. — Umed Singh.

Jhanda Mal died *pendente lite*, and was represented by the first respondent, Sundar Lal.

Umed Singh also died, and the third appellant Mussammat Khemi represented him.

The family owned immoveable property at Pundri and Kaithal in the District of Karnal, at the Sehore Cantonment, at Berasia in the Bhopal State, and at Biawara in the Rajgarh State. They also had a banking and mercantile business with branches at Pundri, Sehore, Berasia, Biawara and Bhopal.

On July 13, 1886, the respondent, Dwarka Das, instituted a suit for partition of the joint estate, other than that situate in the District of Karnal, in the Court of the Political Agent, Bhopal. The defendants to that suit were Beni Pershad and Jhanda Mal.

On September 4, 1901, the Political Agent made his decree in that suit, the subject-matter of Privy Council Appeal No. 5 of 1905.

On August 14, 1888, Jhanda Mal instituted the present suit in the Court of the District Judge of Karnal against Hansaraj, Amar Singh, Umed Singh and Dwarka Das for partition of the whole of the joint estate, moveable and immoveable, situate in the Karnal District and other places already mentioned. By an order of the Chief Court of the Punjab, the suit was transferred to the Court of the District Judge of Delhi.

The appellants, three of the four defendants in the suit, pleaded *inter alia* that they were ready and willing to partition all that constituted the joint estate, but that the suit was barred under S. 12 of the Civil Procedure Code (Act XIV of 1882) in consequence of the pending suit between the parties for the same relief in the Court of the Political Agent, Bhopal, and also in consequence of a reference to arbitration in that suit.

The respondent Dwarka Das, the fourth defendant, by his written statement raised no objection to the plaintiff's claim.

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On October 11, 1889, the District Judge (Mr. Clifford) decided that the Political Agent at Bhopal had no civil jurisdiction and on June 25, 1890, he struck out the appellant's defence, for failing to produce all the books of accounts filed in the Court at Sehore. On August 7, 1890, he made a decree *ex parte* in favour of the plaintiff, but on April 23, 1892, the Chief Court of the Punjab set aside that decree and remanded the case for re-trial.

The plaintiff then amended his plaint, and the appellants in defence reiterated their previous defence and also challenged the jurisdiction of the Delhi Court to partition properties situate out of British India.

It is not necessary to set out the large number of issues fixed in this case. On February 13, 1893, the District Judge (Mr. Rennie) decided that he had no jurisdiction in regard to property, moveable or immoveable, situate outside British India. On an application for review, which the appellants contended was wholly incompetent, another District Judge (Mr. Harris) reversed the order of his predecessor in regard to the moveable property. On November 26, 1894, the District Judge again made an *ex parte* decree in favour of the plaintiff, but on May 11, 1896, the Chief Court reversed that decree and remanded the case for re-trial by the Divisional Judge of Delhi (Mr. Clifford.)

On August 28, 1897, the parties signed an agreement to refer the case for settlement to Mr. Clifford as arbitrator. The agreement provided *inter alia* " that all account books will not be brought here (Delhi) from Sehore, but if the arbitrator thinks proper to examine any of the *bahis*, it will be produced before him." The Chief Court then retransferred the case to the Court of the District Judge of Delhi, and on November 7, 1898, the District Judge made an order of reference, the material part of which was as follows :—

" The arbitrator shall have power to award Rs. 95,000 to " Seth Hans Raj, Amar Singh and Mussammat Khemi, defen- " dants, and Rs. 25,000 to Seth Dwarka Das, defendant, besides " their share, as it was previously agreed to with the mutual con- " sent of the parties out of the joint estate, and to determine what " joint property moveable or immoveable, of any description, apart " from the immoveable property out of British India, is capable of " partition, and he should divide it among the parties according

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" to their share and award to each party whatever may be his due " share. It has also been agreed that the account books would " not be brought from Sehore to Delhi ; if the arbitrator would " require the inspection of any account book in his opinion, that " would be produced before him. Whatever award would be " passed in the case it would be accepted and consented to by " the parties."

On May 25th 1900, the arbitrator made his award. On June 12th, 1900, the appellants filed a petition raising, among others, the following objections to the award :—

" 5. The arbitrator was guilty of misconduct in going " behind accounts which had formally been settled and agreed to " before 2nd April 1881 and thereafter acted upon.

" 6. The arbitrator was guilty of misconduct in violating " the spirit of the agreement in calling for books unnecessarily, " thus :—

"(*a*) Prolonging the enquiry.

" (*b*) Putting objectors to great expense and trouble.

" (*c*) Harrassing him by frequent journeys to a plague-stricken " quarter, when it was not originally contemplated he should " go and eventually bring them out (see Objectors' petition to " Court dated 1st December 1899) notwithstanding all statements " of accounts called for were made and submitted."

" 7. The arbitrator was guilty of further misconduct in, " after objectors had produced over fifty books of account, calling " for, at the instance of the other party, the production of over " two hundred more.

" 8. The arbitrator was guilty of misconduct in drawing " conclusions adverse to objectors, because they did not comply " with this exorbitant demand.

" 13. The arbitrator has been guilty of misconduct in mak- " ing objectors practically purchase the said other firms at exor- " bitant fancy cash prices, and, on the other hand, awarding " Pundri to the other parties at a ridiculously cheap price."

On April 9th, 1901, the District Judge dismissed the appellant's objections and made a decree in accordance with the award.

Against that decree the appellants filed an appeal in the Chief Court of the Punjab, and, in the alternative, prayed for

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revision under S. 622 of the Civil Procedure Code. On June 27, 1902, the Chief Court dismissed the appeal on the ground that the appeal was incompetent, in as much as it did not appear that the decree was in excess of, or not in accordance with, the award. The appellants, thereupon, brought the present appeal to His Majesty in Council.

Appeal No. 5 *of* 1905. Appeal from a decree made by the Court of the Agent to the Governor-General in Central India (November 17, 1902), affirming a decree made by the Court of the Political Agent at Sehore (September 4, 1901).

On July 13, 1886, Dwarka Das instituted the present suit in the Court of the Political Agent at Sehore for partition of the properties within its jurisdiction against Beni Pershad and Jhand Mal.

The Political Agent appointed Commissioners to effect the partition. They proceeded to divide some of the property, and the proceedings not being satisfactory to the parties, on February 18, 1887, an agreement was come to by the parties to refer their disputes to an Arbitrator. He did not act, and a fresh agreement was made on December 24, 1887, appointing four arbitrators. Before any award was made Jhavda Mal, on August 4, 1888, instituted the suit, the subject-matter of Appeal No. 39 of 1905.

On September 4, 1901, the Political Agent accordingly made a decree.

On November 18, 1901, the appellants appealed against that decree to the Court of the Agent to the Governor-General in Central India, and on November 17, 1902, the said Court dismissed the appeal and subsequently refused leave to appeal to His Majesty in Council. The appellants, thereupon, applied to His Majesty in Council for special leave to appeal, which was granted with liberty to the Secretary of State for India in Council to intervene in his official capacity on the question as to the jurisdiction of the Court of the Political Agent.

De Gruyther and *Mitra* for appellants:

On February 13, 1893, Mr. Rennie, the then District Judge, decided that he had no jurisdiction in regard to property, moveable or immoveable, situate outside British India. Mr. Harris,

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who succeeded Mr. Rennie, revised his predecessor's decision and reversed it in regard to moveable property so situated. It was wholly incompetent on the part of Mr. Harris to entertain such an application for review of the judgment delivered by another judge. Mr. Harris had no jurisdiction, under the circumstances of this case, to review his predecessor's judgment—S. 624, Civil Procedure Code. The Chief Court, in delivering its judgment on the appellant's appeal against an order striking out their defence for non-production of account-books said : "We are of opinion that it (production of account books in the Court of Delhi) was neither necessary nor desirable." The agreement to refer the case to arbitration provided that all account books will not be brought here (Delhi) from Sehore. But if the arbitrator thinks proper to examine any of the *bahis*, it will be produced before him." The first order of reference to the arbitrator gave him "all such powers or authorities as are vested in arbitrators under the Code of Civil Procedure, including therein power to call for all books of accounts that he may consider necessary, subject to any decision that may have been passed by the Chief Court, or any agreement between the parties." The arbitrator could not make an order, as he in fact did, for the production of books without regard to the decision of the Chief Court, the agreement of the parties and the order of reference to arbitration. The appellants produced the account books of Bhopal and Berasia shops and explained the non-production of the other books as ordered. But the arbitrator proceeded *ex parte* to make his award, in making which he drew inferences against the appellants from the absence of books. The arbitrator here has been guilty of misconduct.

The District Judge dismissed the appellant's petition of objections to the award and made a decree in accordance with the award. The Chief Court on appeal held that S. 522 of the Civil Procedure Code prohibited an appeal from the District Judge's order, which renders the award final.

The Chief Court relied upon *Ghulam Khan* v. *Muhammad Hassan*,[1] but in that case the award was not objected to on the ground of misconduct of the arbitrator. In the present case, we do not want to challenge the finality of the award, but we allege

1. (1901) L. R. 29 I. A. 51 ; I. L. R. 29 C. 167.

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misconduct on the part of the arbitrator. The District Judge found that there was no misconduct, and we say that there is a right of appeal from that decision of the District Judge. S. 521 of the Civil Procedure Code lays down the grounds on which an award shall be set aside, and misconduct or corruption is one of them. In *Mothooranath Tewaree* v. *Brindabun Tewaree*[1] the first Court set aside an award on the ground of misconduct and made a decree after hearing the case on the merits. On appeal the District Judge reversed the order of the lower Court, setting aside the award and making a decree in accordance with the award. The High Court upheld the decision of the District Judge. It is submitted that there is an appeal when the Court holds that there was no misconduct as well as when the Court holds that there was misconduct.

The High Courts in India have held that an appeal will lie against a decree given in accordance with an award under S. 522 of the Civil Procedure Code, when the award upon which the decree is based is not a valid and legal award—*Kali Prosanno Ghose* v. *Rajani Kant Chatterjee*[2]; *Ramesh Chandra Dhar* v. *Karunamoyi Dutt*[3]; *Venkayya* v. *Venkatappayya*[4]; *Najm-ud-din Ahmad* v. *Albert.*[5]

When the arbitrator is guilty of misconduct, the award is invalid and illegal.

Lord *Atkinson*:—Is there any other method by which you can set aside an award on the ground of corruption?

De Gruyther.—None other except under S. 521.

No. 5 *of* 1905. The decree under appeal is based on the award in the last case. When a decree is based upon a foreign judgment, the foreign judgment must be final. If appeal No. 39 fails, this appeal fails too. But if that appeal is successful, the Secretary of State for India may find a way to get the decree under appeal in this case altered in accordance with the decision of this Board.

Cohen, K. C., and *Ross* for the Secretary of State for India.—No appeal to this Board could lie from an order of the Agent to the Governor-General. This Board has no jurisdiction. If the

1. (1870) 2 W. R. 327.
2. (1897) I. L. R. 25 C. 114.
3. (1906) I. L. R. 33 C. 498.
4. (1891) I. L. R. 15 M. 348.
5. (1907) I. L. R. 29 A. 584.

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Appeal in No. 39 of 1905 failed there is an end to this appeal. But if that appeal were allowed, it was not right that the order of the Political Agent should be allowed to stand as it was entirely based upon the judgment in Appeal No. 39 of 1905. In that case the Secretary of State for India, reserving his right to raise the question of jurisdiction on any further occasion, would see that justice was done. There could be a petition to His Majesty, who could refer the matter to this Board under S. 4 of 3 & 4 Will. 4, C. 41.

Cowell for respondents.—It was never suggested that the decree of the District Court was not in accordance with the award, and when there is a decree in accordance with the award there is no appeal from such a decree—S. 522 of the Civil Procedure Code.

Sir *Arthur Wilson*.—Is there anything to take away the right of appeal on the award? S. 521 refers to setting aside an award on certain grounds only.

Lord *Atkinson*:—Suppose the District Judge refuses an application to set aside an award, and makes a decree in accordance with the award, which stands. Can there be no appeal on refusal to set aside an award?

Cowell.—S. 522 provides an appeal from such a decree in so far as the decree is in excess of, or not in accordance with, the award. If the decree is in accordance with the award, there is no appeal—*Ghulam Khan* v. *Muhammad Hassan*.[1]

De Gruyther replied.

Their Lordships' judgment was delivered by

Lord Macnaghten:—The parties to these two appeals or their predecessors in title have been in litigation now for more than 2 years. The subject of litigation is the property of a joint Hindu family engaged in business, with branches in different parts of the country. Part of the family property is situated in British India; part in Native States. The litigation was begun in 1886, in the Court of the Political Agent at Sehore, in Bhopal, by a suit for partition of so much of the family property as was within his jurisdiction. The next proceeding was a suit for partition, commenced in 1888, in the Court of the District Judge of Karnal in the Punjab.

1. (1901) L. R. 29 I. A. 51, s. c. I. L. R. 29 C. 167.

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In August 1897, after prolonged litigation, the parties to the Punjab suit nominated Mr. S. Clifford, Divisional Judge of Delhi, sole arbitrator to decide the matters in dispute in the suit. The arbitrator was to determine what joint property, moveable and immoveable, except the immoveable property outside of British India, was to be partitioned between the parties. The appointment of Mr. Clifford was duly confirmed by the Court.

The arbitrator finally submitted his award on June 29, 1900.

The appellants filed a great number objections to the award. These objections were considered and disposed of by the District Judge of Delhi, who passed a decree in accordance with the award.

The objections filed by the appellants were all more or less frivolous. In some the arbitrator was charged with misconduct but, on the face of the objections, it is perfectly clear that there was no misconduct within the meaning of that expression in the chapter on arbitration in the Civil Procedure Code, nor anything that could justify the Court in setting aside or remitting the award.

From the decree of the District Judge the appellants appealed to the Chief Court of the Punjab.

The Chief Court dismissed the appeal on the ground that the appeal was incompetent, in as much as it did not appear that the decree was in excess of, or not in accordance with, the award.

In the meantime the Political Agent in Bhopal had made a decree in accordance with Mr. Clifford's award. There was an appeal to the Court of the Agent to the Governor-General in Central India, but the appeal was dismissed. Special leave to appeal against the order of the Agent to the Governor-General was granted by this Board on the representation that there was or might be an important question as to the jurisdiction of the Court of the Political Agent. And liberty was reserved to the Secretary of State for India in Council to intervene in his official capacity. Mr. *Cohen*, who appeared for the Secretary of State, not admitting that an appeal would lie to His Majesty in Council, from the order of the Agent to the Governor-General in India, intimated that the Court of the Political Agent in Bhopal would

be guided by the decision of the Chief Court of the Punjab if His Majesty thought fit to affirm that decision.

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In their Lordships' opinion, the decision of the Chief Court is perfectly right. Their Lordships will therefore humbly advise His Majesty that both appeals should be dismissed.

The appellants will pay the costs of the appeals other than the costs of the intervenant.

Solicitors for appellants: *Messrs. Rubintstein, Myres & Co.*

Solicitors for respondents: *Messrs. T. D. Wilson & Co.*

Solicitor for the Intervenant: *Solicitor for the India Office.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Miller.

Krishnier and others .. Appellants*
v. (*Plaintiffs*).
Lakshmiammal and others .. Respondents
(*Defendants*).

Krishnier v. Lakshmiammal.

Hindu Law—Reversioners' suit for declaration—Limitation—Suit barred against some barred against all—No fresh cause of action on the birth of each new member—Estate of daughters' sons in maternal grandfather's property

Art. 120 is the article applicable to a suit by the reversioners for a declaration that the alienations made by a Hindu widow are not binding on them. and in the case of several reversioners, the suit will be barred against all if it is barred against one of them. A fresh cause of action and a fresh starting point of limitation could not arise on the birth of each new member of the family.

[*Chiruvolu Punnamma* v. *Chiruvolu Perrazu* 1 referred to.]

Obiter.—Daughters' sons of the last male holder, who are members of a joint Hindu family, take the estate of the maternal grandfather with right of survivorship.

Appeal from the decree of the Subordinate Judge's Court of Kumbakonam in A. S. 99 of 1902.

The Advocate-General (P. S. Sivaswami Aiyar) for appellants.

P. R. Sundara Aiyar, T. R. Ramachandra Aiyar and *M. Subrahmanya Aiyar* for respondents.

The Court delivered the following

JUDGMENT:—This is a suit by the plaintiffs as reversioners for a declaration that certain alienations are invalid, so far as they are concerned, after the death of their mother.

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* A. No. 66 of 1904. 25th February 1908.

1. (1906) I. L. R. 29 M. 390 at 408.

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Ananthakrishnaiyar was the last full owner of the property. He died some 45 years ago, leaving a widow Tayamal and two daughters Tailamal and Lachmi. Tayamal gave a house and certain of the lands to the 3rd defendant and certain other land to the 2nd defendant, these being, respectively, the sons of her daughters Tailamal and Lachmi. This was in 1867. Tayamal died about 1870, and Tailamal died in 1901. Lachmi is still alive. She is the mother of the 2nd defendant and of the plaintiffs.

The plaintiffs are the younger brothers of the 2nd defendant, and their suit is for a declaration that the alienations made by Tayamal in 1867 are invalid as against them after the death of their mother Lachmi. Lachmi is the first defendant; her eldest son is the 2nd defendant. Tayamal's son is the 3rd defendant; and the alienees from the latter are the other defendants.

The Subordinate Judge held, *inter alia*, that the plaintiffs' suit was barred by Article 120, Schedule II, of the Limitation Act, and dismissed the suit. The plaintiffs appeal, but we think that the suit is clearly barred. The learned Advocate-General, who appeared for the appellants, admitted that the article of the Limitation Act applicable is No. 120, and that under it the suit is barred unless brought within six years from the time when the cause of action accrued. Plaintiffs Nos. 1 to 4 attained their majority more than six years before the suit was brought, and the Advocate-General did not contend that the suit was not barred so far as they were concerned. He, however, argued that the suit by the 5th plaintiff was not barred as it was brought within three years of his attaining majority. His contention was that the right of each reversioner is derived direct from the last full owner and not from any intermediate reversioner, and that the 5th plaintiff's right to sue could not have arisen until after his birth and that he may, therefore, sue at any time within three years of attaining majority. We think this argument is fallacious. The plaintiffs are admittedly members of a joint Hindu family, and they would be entitled to succeed jointly to the estate of their maternal grandfather Ananthakrishnaiyar if their mother, Lachmi, were now dead—*Venkayyamma Garu* v. *Venkatrāmanayyamma Bahadur Garu.*[1] They would inherit his estate as ancestral

1. (1902) I. L. R. 25 M. 678.

Krishnier v. Lakshmiammal.

property under the ordinary law of inheritance with right of survivorship. The first plaintiff was alive at the date of the alienations, and the right to sue accrued to the family on the date of the alienation—*Chiruvolu Punnamma* v. *Chiruvolu Perrazu.*[1] The first plaintiff attained majority many years ago and could have brought the present suit on behalf of the joint family. It is clear that in a suit by the plaintiffs to recover a debt due to their joint family, and which belonged to their joint family, a fresh cause of action, a fresh starting point for limitation, would not arise on the birth of each new member of the family. The interest of such a member would be held to have been represented by the other members of the joint family, and it is impossible to hold that in a suit like the present, where the 5th plaintiff's interest in the subject-matter of the suit is more remote, he should be in a more favourable position as regards representation by other members of the family. His interest was represented by the manager and other members of the family who allowed the right of the family to bring the suit to be barred many years ago. We, therefore, dismiss the appeal with costs.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[APPEAL FROM THE CHIEF COURT OF LOWER BURMA.]

Present :—Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble and Sir Arthur Wilson.

T. P. Petherperumal Chetty .. Appellant*

v.

R. Muniandy Servai and others .. Respondents.

Petherperumal Chetty v. Muniandy Servai.

Benami conveyance—Colourable conveyance in fraud of creditor—Fraud, absolutely defeated—Suit by real owner against benamidar—Right of real owner to recover possession of his property—No bar by not first having the colourable conveyance set aside—Limitation Act (XV of 1877) Schedule II. Arts. 91 and 144.

A benami conveyance is not intended to be an operative instrument.

Where a benami conveyance is executed in order to defraud creditors, if the fraud has not been effected, there is nothing to prevent the executant from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme and recovering possession of his property.

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* 18th March 1908.

1 (1906) I. L. R. 29 M. 390 at p. 408.

Petherperumal Chetty v. Muniandy Servai.

[*Taylor* v. *Bowers* 1; *Symes* v. *Hughes* 2; *In re Great Berlin Steamboat Co.* 3; followed. *Kearly* v. *Thompson* 4 explained.]

To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud the contemplated fraud must be effected; then and then alone does the fraudulent grantor or giver lose the right to claim the aid of the law to recover the property he has parted with.

But where the fraudulent or illegal purpose has actually been effected by means of the colourable grant, then the maxim applies—*In pari delicto potior est conditio possidentis*. The Court will help neither party and the estate will lie where it falls.

Where there is a benami transfer for the purpose of defeating creditors and the purpose is not carried out, the instrument is inoperative; and a suit by the executant of the deed for the recovery of possession of properties from the transferee is governed by Art. 144 and not by Art. 91 of the Limitation Act.

Obiter.—In conspiracy, the concert or agreement of the two minds is the offence, and the overt act is but the outward and visible evidence of it.

Appeal from a decree of the Chief Court of Lower Burma affirming a decree of the District Court of Hanthawaddy.

One Muniandi Maistry was the owner of a grant known as the Tankkyan Grant. During the years 1888 and 1889 he borrowed several sums of money from one Stumpp, with whom the title deeds of the said grant were deposited as security for the repayment of the debt. Muniandi Maistry died in October 3, 1890, leaving him surviving as his next heir, his mother Sigappa, to whom letters of administration to his estate were granted by the Court of the Recorder of Rangoon.

On November 28, 1890, Stumpp assigned the said debt to one Arunachellam Chetty.

Sigappa died on December 1, 1893, and on her death, the next heirs to the estate of Muniandi Maistry were his cousins Chellum Servai and Muniandy Servai, who were brothers and members of a joint undivided family. In 1894 letters of administration were granted to Chellum Servai of the estate of Muniandi Maistry.

On September 18, 1895, Arunachellum Chetty instituted a suit in the Court of the District Judge of Hanthawaddy to recover the amount due, viz. Rs. 14,568-12-0 by sale of the said grant. In the meantime Chellum Servai had on June 11, 1895, executed what purported to be a sale of the said grant to one T. P. Petherperumal Chetty for a consideration of Rs. 30,000 for the grant and

1. (1876) 1. Q. B. D. 291
2. (1870) L. R. 9 Eq. 475 at 479.
3. (1884) 26 Ch. D. 616.
4. (1890) 24 Q. B. D. 742.

four years arrears of rent due from the tenants. The respondent Muniandy Servai contended in the present suit that the said deed of sale was a fictitious transaction, and executed with intent to prevent the sale of the property by Arunachellum Chetty. In defence to the said suit it was pleaded that the sale to T. P. Petherperumal Chetty, who had no notice of the equitable mortgages, gave him a title free from the incumbrance. On January 3, 1896, the District Judge gave Arunachellum Chetty a decree for sale, finding that T. P. Petherperumal Chetty, at the time of the conveyance to him, had full notice of the equitable mortgage.

That decree was confirmed on appeal.

T. P. Petherperumal, thereupon, mortgaged the said grant to R. M. A. R. L. Muthia Chetty and P. R. M. P. Chinnia Chetty, respondents Nos. 3 & 4, and obtained from them a loan and discharged the amount due to Arunachellum Chetty for debt and cost. No question as to the validity of this mortgage was raised in the present suit.

Chellum Servai died on June 15, 1896, and on his death, Muniandy Servai, respondent No 1, became entitled to the estate. At that time he was in Madras and did not return to Burma till some six months later. T. P. Petherperumal Chetty then asserted an absolute title in himself to the said grant.

On June 4, 1897, Muniandy Servai applied for letters of administration to such portion of the estate of Muniandi Maistry as was unadministered. In his application he challenged the title of T. P. Petherperumal Chetty who opposed the application. In the result an order was made on July 15, 1897, for a regular civil suit to establish the title of Muniandy Servai, whose application was refused. The dispute was thereafter referred to a punchayet, who decided in favour of Muniandy Servai. T. P. Petheperumal Chetty agreed to restore possession and render accounts. Muniandy Servai wished to return at once to Madras; so Rs. 1,000 was paid to him on account, and the actual delivery of possession and settlement of accounts was postponed till his return. He left Rangoon on the morning of July 30, 1897, and at 7 o'clock on the morning of the same day executed a document which purported to be a release of all claims, but it was contended by Muniandi Servai that at the time of execution T. P. Petherperumal Chetty fraudulently represented that it was a record of the arrangement come to as above set out.

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Muniandi Servai returned to Burma about a year afterwards. T P. Petherperumal Chetty refused to give up possession, and set up the document of July 30, 1897, as a release. On July 24, 1901, Muniandi Servai instituted the present suit in the Court of the District Judge of Hanthawaddy against T. P. Petherperumal Chetty and respondents Nos. 2 & 3 the mortgagees, as defendants. He claimed possession of the said grant and alleged that the deed of sale dated June 11, 1895, was not a real transaction, and that the deed of release dated July 30, 1897, had been fraudulently obtained from him.

The defence was a denial of the plaintiff's allegations. It was also pleaded that the plaintiff had no right to sue. On the pleadings the District Judge fixed the following principal issues :—

(1) Is the plaintiff solely entitled to the plaint premises ? If not, what is his share therein ?

(2) Is the conveyance dated the 11th June 1895, in para (7) of the plaint, benami ? Is the plaintiff entitled to question its validity ?

(3) If not, is it valid as against the plaintiff, and on what conditions liable to be set aside ?

(4) Was there an agreement as stated in para. 15 of the plaint ?

(5) Was the release, dated the 30th July 1897, executed by the plaintiff under the fraudulent misrepresentations (as stated in paras 16, 17 and 18) of the first defendant ?

(6) Did the plaintiff receive the sum of Rs. 1,000 in full satisfaction of all his claims ?

(7) Is the release, dated 30th July 1897, of any legal effect ?

The District Judge decided on the first issue that the plaintiff was entitled to sue, as head of the joint family, for the entire estate. On the second and third issues he held that the convenyance dated June 11th, 1895, was a benami conveyance and the plaintiff had the right to question its validity, and that in place of that benami deed must be substituted the real agreement between Petherperumal and Chellum—Petherperumal accounting for rents received and money raised on the security of the land, and plaintiff crediting cost of collection and litigation and other expenses

justly debitable to the administration of the property as well as money received for the personal use of Chellum and himself.

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On the remaining issues he decided that Petherperumal Chetty had recognised the plaintiff's claim before the Punchayet and agreed to restore possession and render accounts on the plaintiff's return from Madras. He also found that the release dated July 30, 1897, was obtained by fraud, and was not binding on the plaintiff though admissible in evidence in consequence of an order passed by his predecessor in office. He was of opinion that the suit was not barred by limitation, and, in accordance with his findings, made a decree in favour of the plaintiff on March 9, 1903.

Against that decree the son of T. P. Petherperumal Chetty (who had been substituted on record in place of his father deceased) appealed to the Chief Court of Lower Burma, and on February 2, 1905. the Chief Court delivered its judgment, and affirmed all the findings of fact and law of the Court below except in one particular. The Chief Court decided that the release dated July 30, 1897, was not duly registered and thus inoperative to affect the immovable property. In the result, a decree was made dismissing the appeal.

The appellant, thereupon, preferred the present appeal to His Majesty in Council.

Upjohn, K. C., and *Baelhache* for appellant.

The first respondent contends that the conveyance of June 11, 1895, was made to defraud a creditor and that conveyance was benami. If he succeeds, the effect would be to increase fraud upon creditors. But if it fails, debtors would be deterred from combining with others to defraud creditors. It is desirable to promote commercial morality and the maxim *in pari delicto potior est conditio possidentis* should, in a case like this, be rigorously applied. To adopt a course otherwise would import confusion into the law.

The first respondent cannot succeed unless he shows that the fraud was not carried out. In *Taylor* v. *Bowers*[1] the document was actually used in the then pending litigation. When two persons are party to a conveyance, which on the face of it is genuine, for a reasonable consideration, and the object of it is to

1. (1876) I. Q. B. D. 291.

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use it in a pending litigation for the purpose of defeating the plaintiff's claim in that litigation, the user of that conveyance is the accomplishment of that fraud, and any property transferred by one of them to the other cannot be recovered back. [Lord *Macnaghten*.—Any authority for that?] Mr. *Upjohn*.—Not directly, my Lord, but *Kearley* v. *Thomson*[1] shows that partial performance of an illegal contract prevents a plaintiff from recovering back the money paid under it. Reference was also made to *Mayne* on *Hindu Law and Usage* (6th Ed.) pp. 571, Ch. 13, art 404 and *Govinda Kuar* v. *Lala Kishun Prosad*[2] and *Kali Charan Pal* v. *Rasik Lal Pal*.[3] The first respondent cannot succeed unless the conveyance of June 11, 1895, is set aside. The period of limitation allowed to set it aside is three years—Indian Limitation Act (XV of 1877) Sch. 2, Art. 91. That period began to run when the right to cancel it arose on the death of Chellum in 1896 when the plaintiff knew all the facts, though the Courts in India have held that he knew the facts all along even before that time in 1895.

De Gruyther for the first respondent was not called upon.

Their Lordships' judgment was delivered by

Lord Atkinson :—In this case an action was originally brought by R. Muniandy Servai, claiming through his deceased brother Chellum Servai, who was himself heir and administrator of one Muniandy Maistry, against T. P. Petherperumal Chetty, the uncle and predecessor of the appellant (hereinafter called "Petherperumal the elder") and two formal defendants, R. M. A. R. L. Muthia Chetty and P. R. M. P. Chinnia Chetty to recover possession of certain tract of paddy land about 2,500 acres in extent, known as Government waste land No. 1 situate in Tamanaing Circle, Kungyangon Township, Hanthawaddy District, Lower Burma. One Arunachallam Chetty claimed to be an incumbrancer on these lands, as equitable mortgagee by deposit of the title deeds for a sum of Rs. 14,568-12-0.

On the 11th June 1895, Chellum Servai executed a deed purporting to be a conveyance on sale of the above mentioned lands to Petherperumal Chetty the elder, a money-lender, residing in Rangoon, in consideration of the sum of Rs. 30,000 the receipt whereof was thereby acknowledged.

1. (1890) 24 Q. B. D. 742. 2. (1900) I. L. R. 28 C. 370 at p. 379.
3. (1896) I. L. R. 23 C. 962.

On the 18th September 1895, Arunachellam Chetty, the equitable mortgagee, instituted a suit in the District Court of Hanthawaddy, against Chellum Servai, as administrator of the estate of Muniandy Maistry, deceased, and Petherperumal the elder, in which he alleged that at the time of the execution of the above-mentioned conveyance Petherperumal the elder was aware of the existence of his (Arunachellum's) claim as equitable mortgagee, and that the sum of Rs. 30,000, the consideration mentioned in the deed, had never been paid, and claimed that he might be declared entitled to hold his equitable mortgage over these lands in priority to the last mentioned conveyance, and that the defendant Chellum Servai might be ordered to pay to him the sum of Rs. 14,568-12-0 with interest, and other relief.

Petherperumal, the elder, filed his defence, and the case having come on for hearing, the District Judge decided, amongst other things, that Petherperumal, the elder, was, at the date of the deed of conveyance to him well aware of the existence of this equitable mortgage, and declared that the latter was entitled to priority over the former, and ordered the defendant Chellum Servai, to pay to the plaintiff the amount of the latter's claim. Thereupon Petherperumal, the elder, procured a loan from the two defendants to the present suit, sufficient to enable him to discharge the amount due to Arnuchellam Chetty for debt and costs, and as security for this loan he executed a mortgage of the lands now sought to be recovered. No question has been raised as to the validity of this latter incumbrance.

It is therefore clear, that, whatever may have been the design to effect which the deed of the 11th June 1895, was executed, Arunachellam Chetty, the creditor, was not by it in fact defrauded of his debt. He was paid his debt together with the costs of the litigation which he successfully prosecuted, and if his interests were prejudiced at all, it was only to the extent that he was obliged to take proceedings which, had the deed never been executed, he might possibly never have been obliged to take.

On the 30th July 1897 R. Muniandy Servai and Petherperumal, the elder, executed a deed of release by which the former released all his interest in the lands sued for in consideration of Rs. 1,000 paid to him by the latter. The District Judge found that the execution of this deed was procured by misrepresentation,

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and declared that its only effect at law was as a receipt for the sum of Rs. 1,000. No objection was taken in the argument on the appeal in reference to the finding on this point.

It was proved by the affirmation of Muniandy Servai given in evidence in this case, that the deed of the 11th June 1895 was executed in order to enable the rent to be collected and paid to the grantors, and "to quash Subramanian's case," *i.e.*, the case of the equitable mortgagee. The District Judge held that it was a "*benami* conveyance" made by the parties to it "in collusion to defeat" the claim of the equitable mortgagee on the lands. The Chief Court of Burma on appeal upheld that decision.

It was not pressed in argument by Counsel on behalf of the appellant that, on an issue of fact such as this, the finding of the Judge, who tried the case and saw the witnesses, approved, as it was, upon appeal, should under the circumstances of the case be disturbed. The only questions, therefore, for their Lordships' decision are:—

1. Is the plaintiff, despite his participation in this fraudulent attempt to defeat his creditor, entitled to recover the possession of the lands purported to be conveyed?

2. Is his right of action barred by the 91st Article, Schedule II, to the Indian Limitation Act?

Their Lordships are of opinion that their answer to the first question must be in the affirmative.

A *benami* conveyance is not intended to be an operative instrument.

In *Mayne's* Hindu Law (7th Ed. p. 595, para. 446) the result of the authorities on the subject of *benami* transactions is correctly stated thus:—

"446 * * * Where a transaction is once made out to be "a mere *benami* it is evident that the *benamidar* absolutely dis- "appears from the title. His name is simply an *alias* for that of "the person beneficially interested. The fact that *A* has assumed "the name of *B* in order to cheat *X*, can be no reason whatever "why a Court should assist or permit B to cheat *A*. But if "*A* requires the help of the Court to get the estate back "to his own possession, or to get the title in his own name, it "may be very material to consider whether *A* has actually "cheated *X* or not. If he has done so by means of his *alias*, then

"it has ceased to be a mere mask and has become a reality. It "may be very proper for a court to say that it will not allow "him to resume the individuality which he has once cast off in "order to defraud others. If, however, he has not defrauded "any one, there can be no reason why the Court should punish "his intention by giving his estate away to *B*, whose roguery is "even more complicated than his own. This appears to be the "principle of the English decisions. For instance, persons have "been allowed to recover property which they had assigned "away * * * where they had intended to defraud creditors, "who, in fact, were never injured * * * But where the fraudu- "lent or illegal purpose has actually been effected by means of "the colourable grant, then the maxim applies. *In pari delicto* "*potior est conditio possidentis.* The court will help neither party. Let the estate lie where it falls."

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Notwithstanding this, it is contended on behalf of the appellant that so much confusion would be imported into the law, if the maxim *in pari delicto potior est conditio possidentis* were not rigorously applied to this case, and, apparently, that the cause of the commercial morality would be so much prejudiced if debtors who desired to defraud their creditors were not deterred from trusting knaves like the defendant, that in the interest of of the public good, as it were, he ought to be permitted to keep for himself the property into the possession of which he was unrighteously and unwisely put.

The answer to that is that the plaintiff in suing to recover possession of the property, is not carrying out the illegal transaction, but is seeking to put every one, as far as possible, in the same position as they were in before that transaction was determined upon. It is the defendant who is relying upon the fraud and is seeking to make title to the lands through and by means of it. And despite his anxiety to effect great moral ends, he cannot be permitted to do this. And, further, the purpose of the fraud having not only not been effected, but absolutely defeated, there is nothing to prevent the plaintiff from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme, and recovering possession of his property. The decision of the Court of Appeal in *Taylor* v. *Bowers*[1] and the authorities upon which that decision is based clearly establish

1. (1876) 1 Q. B. D. 291.

this; *Symes* v. *Hughes* [1] and *In re Great Berlin Steamboat Co.*,[2] are to the same effect. And the authority of these decisions, as applied to a case like the present, is not, in their Lordships' opinion, shaken by the observations of *Fry*, L. J., in *Kearly* v. *Thomson*.[3]

Mr. *Upjohn*, contended that, where there is a fraudulent arrangement to defeat the creditors, such as was entered into in this case, if anything be done or any step be taken to carry out the arrangement, such as, on the trial of an indictment for conspiracy, any property transferred by the debtor to his co-conspirator cannot be recovered back. This however, is obviously not the law. In conspiracy the conceit or agreement of the two minds is the offence, the overt act is but the outward and visible evidence it. Very often the overt act is but one of the many steps necessary to the accomplishment of the illegal purpose, and may, in itself, be comparatively insignificant and harmless; but to enable a fraudulent confederate to retain property transferred to him in order to effect a fraud, the contemplated fraud must, according to the authorities, be effected. Then, and then alone, does the fraudulent grantor, or giver, lose the right to claim the aid of the law to recover the property he has parted with.

As to the point raised on the Indian Limitation Act, 1877, their Lordships are of opinion that the conveyance of the 11th June, 1895, being an inoperative instrument, as, in effect, it has been found to be, does not bar the plaintiff's right to recover possession of his land, and that it is unnecessary for him to have it set aside, as a preliminary to his obtaining the relief he claims. The 144th and not 91st article in the second schedule to the Act is, therefore, that which applies to the case, and the suit has consequently been instituted in time. Their Lordships are, for these reasons, of opinion that the decision appealed from is right and should be affirmed, and that this appeal should be dismissed. They will humbly advise His Majesty accordingly.

The appellant will pay the costs of the appeal.

Solicitors for appellant : *A. H. Arnold & Son.*

Solicitors for first respondent : *Sanderson, Adkin, Lee and Eddis.*

The second and third respondents did not appear.

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1. (1870) L. R. 9 Eq. 475 at p. 479.
2. (1884) 26Ch. D. 616.
3. (1890) 24 Q. B. D. 742.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT FORT WILLIAM IN BENGAL.]

Present:—Lord Macnaghten, Lord Atkinson, Sir A[illegible] Scoble and Sri Arthur Wilson.

Radha Prosad Mullick & another .. Appellants*

v.

Ranimoni Dassi & others .. Respondents.

Radha Prosad v. Ranimoni Dassi.

Hindu Law—Will—Construction—Consideration for—Gift to daughters "and their respective sons"—Share of a daughter dying "without leaving any male issue surviving" to go to the surviving daughter and her sons—Share of a daughter dying leaving sons to go to her son or sons—Intention of the testator—Exclusion of daughters' daughters—Nature of estate taken by each daughter—Indian Succession Act (X of 1865) S. 82.

In construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate.

[*Mahomed Shumsool* v. *Shewukram*[1] approved and followed.]

Where the only question raised upon the appeal was as to the nature of the estate which, in the events which had happened, the testator's daughters took under the clause of the will of a Hindu inhabitant of Calcutta; viz, "I desire and direct my executors, "* *, to make over and divide the whole of my estate, both real and personal, unto "and between my daughters in equal shares, to whom and their respective sons I give, "devise and bequeath the same, but should either of my said daughters die without "leaving any male issue surviving, but leaving my other daughter her surviving, then "in such case the surviving daughter and her sons shall be entitled to the share of the "deceased daughter, or in the case of the death of either daughter leaving sons, the "share of such daughter is to be paid to such her son or sons share and share alike:"

Held, that the intention of the testator was to create in favour of his daughters an estate for life with a remainder over to their sons, and that, in the events that had happened, the daughters of the testator were entitled to the testator's estate in equal shares for life and with benefit of survivorship between themselves.

Held, also, that by the gift to his daughters "and their respective sons" and by the proviso that in the event of one of the daughters dying "without leaving any male issue surviving," then the share of the deceased daughter was to go to the surviving daughter and her sons, to the exclusion in both cases of female issue, the testator had clearly succeeded in showing that his daughters, whom he incontestably intended to benefit, were not to have more than what was generally known to be a woman's estate in his property, and that no language could more clearly show than the language of the clause, "in the case of the death of either daughter leaving sons the share of such daughter to

* 1908 Feb. 5 & 11 May 14.

1. (1874) L. R. 2 I. A. 7 at p. 14.

Radha Prosad v. Banimoni Dassi.

be paid to such her son or sons share and share alike, " that the intention of the testator was to exclude his daughter's daughters from the succession to which they would have been entitled under the ordinary Hindu Law, if their mother's estate had been absolute.

It was contended that under S. 82 of the Indian Succession Act (X of 1865) the daughters took absolute estates :

Held, that, under the terms of the will a restricted interest was intended to pass to a daughter dying without male issue.

Appeal from a decree of the Appellate Side of the Calcutta High Court modifying a decree of *Woodroffe* J., sitting on the Original Side of the said High Court.

The principal questions raised in the appeal were questions of law relating to the construction of the will of one Hurry Dass Dutt, who died on October 30, 1875. The testator executed the will on the day of his death and thereby appointed three executors and trustees, *viz*:—(1) Srimutty Surnomoni Dassi, his widow; (2) Modhusudan Dutt, his father; and (3) Dwarka Nath Dutt, his uncle.

The following is the material part of the will:—" Whereas " having no son born to me of my body I am desirous of adopting " one in my life-time but in case I depart this life before carrying " such my desire into effect, I hereby authorize and empower my " wife and executrix Srimutty Surnomoni Dassi and my executors " and trustees to whom I give full permission and liberty to adopt " after my decease a son and in case of his death during his " minority or on attaining his full age and without leaving male " issue to adopt a second son and in case of his death during " minority or on attaining such age and without leaving male issue " to adopt a third son and no more. In any of the above cases " of adoption should the adopted son die leaving a son or sons the " power of adoption shall cease or remain in abeyance during the " life or livestime of such son or sons of such adopted son but " shall revive on the death of such son or sons during minority. " I direct my executors and executrix and trustees to pay out of " the income and interest of my estate and effects monthly all " necessary household expenses as well as for the worship of our " family idol Sri Radha Gobindji and to pay my wife monthly " during her natural life for her sole and separate use the sum of " rupees two hundred and also the sum of rupees fifty monthly to

"such adopted son who shall live and attain his full age of 18 "years after his so attaining such age of 18 years during the life-"time of my said wife provided he remains under her control and "bears a good character and if my said executrix and executors "and trustees think fit and are satisfied with his conduct and "behaviour and for the purposes of such monthly expenditure "my executrix, executors and trustees shall set apart and retain out "of the interest and income of my estate a sum sufficient to "meet such expenditure for six months and invest the rest and "residue of such income and interest in Government Securities "in their joint names but in no case shall such adopted son have "or exercise any control or dominion over my estate and effects "until the death of my wife, after which event I direct my said "executors and trustees to make over the whole of my estate and "effects both real and personal or immoveable or moveable whatso-"ever and wheresoever and of what nature or quality soever to "such adopted son who shall survive my wife if he shall have "attained his age of 18 years during the life-time of my wife or "on his so attaining such age after her decease to whom and his "heirs I give, devise and bequeath the same. But in case none of "such adopted sons survive my said wife or in case of either "surviving my said wife and dying under the age without leaving "a son or sons I desire and direct my executors after the death of "my said wife or the death of such son after her but under such "age of 18 years without leaving a son or sons to make over and "divide the whole of my estate both real and personal unto and "between my daughters in equal shares to whom and their respec-"tive sons I give, devise and bequeath the same but should "either of my said daughters die without leaving any male issue "surviving but leaving my other daughter her surviving then in "such case the surviving daughter and her sons shall be entitled "to the share of the deceased daughter or in case of the death of "either daughter leaving sons the share of such daughter is to "be paid to such her son or sons share and share alike."

Hurry Dass Dutt left him surviving the following persons, *viz.*,

(1) His widow Srimutty Surnomoni Dassi.

(2) His daughter Srimutty Ranimoni Dassi.

(3) His daughter Srimutty Premoni Dassi.

(4) Three sons of Premoni Dassi, *viz.*, 1. Radha Prosad Mullick, 2. Kasi Prosad Mullick, 3. Jyoti Prosad Mullick.

On December 20, 1875, probate of the will was granted to the widow and uncle of the deceased, two of the executors named.

On August 9, 1876, Srimutty Surnomoni adopted Jyoti Prosad Mullick as a son, but Jyoti Prosad Mullick died on January 9, 1881, unmarried. Thereafter on February 9, 1881, she adopted one Amrita Lall Dutt. Modhusudan Dutt died on April 1, 1877, before the date of the latter adoption. On August 14, 1894, Amrita Lall Dutt instituted a suit against the widow, her daughters and their sons for the construction of the will of Hurry Dass Dutt and for the administration of his estate. That suit, though successful in the first Court,[1] failed on appeal,[2] and also on a further appeal to the Judicial Committee of the Privy Council,[3] as the adoption by Srimutty Surnomoni was held to be invalid, the power of adoption conferred by the will on her and the executors and trustees having been declared invalid under Hindu Law and incapable of being exercised. The decision of the Privy Council was pronounced on May 2, 1900, and on November 2, 1900, Ranimoni, who was until then childless, and her husband, Romakant Sen, adopted one Jugal Kishore Sen as their son.

Dwarka Nath Dutt died on November 23, 1889, and Romakant Sen predeceased Surnomoni, who died on August 14, 1904. She held and managed the estate of her deceased husband and left a will dated January 31, 1903, by which she purported to deal with portions of the property covered by the present suit. The Administrator-General of Bengal, the executor named in her will, was in possession of those portions, having taken out probate of the will, but he was not a party to the present suit.

On December 19, 1904, the present suit was instituted on the Original Side of the High Court by Srimutty Ranimoni Dassi, one of the daughters of Hurry Dass Dutt, as plaintiff. The defendants were Srimutty Premoni Dassi, the other daughter of Hurry Dass Dutt, her four sons Radha Prosad Mullick, Kasi Prosad Mullick, Peary Lall Mullick and Behary Lall Mullick (the two

1. (1897) Amrita Lall Dutt *v.* Surnomoye Dassi, I. L. R. 24 C. 589.
2. (1898) Amrita Lall Dutt *v.* Surnomoni Dassi, I. L. R. 25 Cal. 662
3. (1900) Amrita Lall Dutt *v.* Surnomoye Dassi, L. R. 27 I. A. 128.

latter of whom were born after Hurry Dass Dutt's death), and Jugal Kishore Sen. The plaintiff contended that under the will of Hurry Dass Dutt in the events that had occurred she and her sister were each entitled absolutely to a moiety in their father's estate.

The reliefs sought were the administration and partition of the estate, with various reliefs incidental thereto, but the principal relief claimed was a declaration of the rights of all the parties to the suit on the true construction of the said will.

The written statement filed on behalf of Peary Lall Mullick and Behary Lall Mullick challenged the validity of the adoption of Jugal Kishore Sen, and contended that in the events which had happened Hurry Dass Dutt had died intestate as to the residue of his estate to which their mother succeeded in preference to her sister. A written statement of exactly the same nature was filed by Srimutty Premoni Dassi.

Radha Prosad Mullick and Kasi Prosad Mullick by their written statement claimed that they were absolutely entitled to the whole estate subject to the life interest of Hurry Dass Dutt's daughters. The written statement of Jugal Kishore Sen supported the claim of the plaintiff.

The case was tried by *Woodroffe* J. who delivered his judgment on July 31, 1905.[1] He decided on the true construction of the will that there was a gift to the adopted son with a valid gift over to the testator's daughters, and that there was no intestacy. He also held that each of the daughters took an absolute estate in her half share, and expressed no opinion as to the rights of the parties, in the event of the death of one of the daughters leaving no natural son her surviving. A decree was accordingly made declaring that the plaintiff was entitled absolutely to one-half share in her father's estate, directing an inquiry to ascertain what the estate consisted of, and ordering partition thereof.

Against that decree Radha Prosad Mullick and Kasi Prosad Mullick filed one appeal, Peary Lal Mullick and Behary Lal Mullick another appeal, on the appellate side of the High Court, and on April 23, 1906, the Court of Appeal delivered judgment.

1. (1906) *Radha Prasad Mullick* v. *Ranee Mom Dassi* and *Peary Lall Mullick* v. *Ranee Moni Dassi*, I. L. R. 33 C. 947.

It decided that under the will in this case the daughters each took a one-half share in their father's estate absolutely, and refused to decide what the rights of the parties would be in the event of one of the daughters dying without male issue. It further held that the enquiry ordered by the lower Court regarding the ascertainment of what the testator's estate consisted of could not properly be directed in the absence of the representatives of the testator or of Surnomoni Dassi. In the result, the decree of the Court below was varied, the declaration of the plaintiff's rights was affirmed, and the enquiry as to the property and partition thereof were refused in the present suit.

Against that decree, Radha Prosad Mullick and Kasi Prosad Mullick preferred the present appeal to His Majesty in Council. Of the respondents, only Ranimoni Dassi was represented at the hearing of the appeal.

Mr. De Gruyther for the appellants:—The construction of this will has already been before this Board in the case of *Amrito Lal Dutt* v. *Surnomoye Dassi*,[1] which decided that by this will a joint power to adopt was conferred on the executors of the will and was invalid in law, in consequence of which the son adopted in fact had no status in the family The question for decision is whether each of the daughters took a life-estate, or an absolute estate. For the rules to be applied in determining the construction of the will of a Hindu see *Mahomed Shumsool* v. *Shewukram.*[2] In the absence of express words in a will showing such an intention, a devise to a wife does not confer an estate of inheritance but carries only a widow's estate as understood by Hindu Law, that is to say, a limited widow's estate: *Hirabai* v. *Lakshmibai*;[3] *Annaji Dattatraya* v. *Chandrabai*;[4] *Harilal* v. *Bai Rewa*;[5] and *Mahomed Shumsool* v. *Shewukram.*[6] In *Surajmani* v. *Rabi Nath Ojha*,[7] where the testator used the word "Malik" in making the devise to his wife and daughter-in-law, their Lordships held that the widow took an absolute estate. There the construction depended upon the meaning of the word "Malik" and in deciding

1. (1900) L. R. 27 I. A. 128 I. L. R. 27 C. 996.
2. (1874) L. R. 2. I. A. 7, at p. 10, also at pp. 13, 14, *et seq.*
3. (1886) (1887) I. L. R. 11 Bom. 69, also 573, at p. 578.
4. (1892) I. L. R. 17 Bom. 503, at p. 505.
5. (1895) I. L. R. 21 Bom. 376 at pp. 380 and 381.
6. (1874) L. R. 2 I. A. 7, at p. 14.
7. (1907) L. R. 35 I. A. 17.

that case for the meaning of that word the case of ***Lalit Mohun Singh Roy* v. *Chukkun Lal Roy*,**[1] was referred to. But that case has left untouched the general principle that without express words in a will a widow takes only a limited estate under it. A daughter's estate in Hindu Law is also limited. It is submitted that the testator here intended to give his daughter only limited estates and they took only estates for life.

Where the testator intends to give an absolute estate to his adopted son he uses the words "to him and his heirs."

But in making a gift to his daughters, in half a dozen lines further on he uses another expression, viz, ***their sons.*** That shows that he did not intend to give them absolute estates, otherwise he would have used the same expression.

The testator left him surviving a brother, a daughter and another daughter and her two sons. For the rules of succession in a case like this, and with reference to the question whether the daughters take absolute estates. See *Stokes'* Hindu Law Books, *Daya Bhaga*, Ch. 4, Sections 2 and 3, and *Mayne* on Hindu Law and Usage (7th ed.) p. 900, S. 673.

There is a gift over of the share of the daughter dying "without male issue" to her surviving sister. Such a gift is inconsistent with an absolute gift to the daughters. If the testator gave an absolute estate to each of his daughters there was no necessity of a gift over after the death of a daughter without a male issue : *Tagore case.*[2] Gift over is necessary only if there is a life estate given to the daughter.

Sir Robert Finlay K. C. and *Kenworthy Brown* for the respondent Ranimoni Dassi.—Taking first the last part of the argument on the other side the testator provides "in case of the death of either daughter leaving sons the share of such daughter is to be paid to such her son or sons share and share alike." It is also necessary to provide in case a daughter died without leaving son. Hence the clause "but should either of my said daughters die without leaving any male issue surviving, &c." The gift is dependent upon the happening of a specified uncertain event and the condition must be fulfilled before distribution. S. 2 of the Hindu Wills Act (XXI of 1870) makes S. 111 of the

1. (1897) L. R. 24 I. A. 76.

2. (1872) L. R. I. A. Sup. Vol. 47.

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Indian Succession Act (X of 1865) applicable to the wills of Hindus. When S. 111 of the Indian Succession Act is applied to this will the whole of it becomes consistent. The period of distribution is the testator's death and the daughters take absolute estates and the gifts over do not take effect.—Indian Succession Act, S. 111, Illustrations (*b*) and (*d*); *Norendra Nath Sircar* v. *Kamalbasini Dasi*[1]; *Lala Ramjewan Lal* v. *Dal Koer*[2]; *Manikyamala Bose* v. *Nanda Kumar Bose*.[3] It is not necessary to go to earlier law to find out the meaning of S. 111 which must be construed without reference to earlier law: *Norendra Nath Sircar* v. *Kamalbasini Dasi*.[4] "Surviving daughters and her sons shall be enitled to the share of the deceased daughter" means that the surviving daughter will take absolutely. Though under the Hindu Law a married daughter takes by inheritance a limited estate, she takes an absolute estate under a devise by will, unless her interest is curtailed by express words or by necessary implication: Indian Succession Act, S. 82 (made applicable to Hindu Wills by S. 2 of the Hindu Wills Act); *Bhoba Tarini Debya* v. *Peary Lal Sanyal*[5]; *Ramasami* v. *Papayya*[6]; *Atul Krishna Sircar* v. *Sanyasi Charu Sircar*.[7] There is nothing here to curtail, either by express words or necessary implication, the daughter's interest, and the Court in such a case would construe that an estate of inheritance is given.

In *Hirabai* v. *Lakshmibai*[8] and also in *Harilal* v. *Bai Rewa*[9] the gift was from a husdand to his wife. In *Annaji Dattatrya* v. *Chandrabai*[10] a son made a gift by deed to his mother for her maintenance. But here the gift is from a father to his daughters who can take a gift of immovables from their father with power to alienate according to their pleasure: *Stokes'* Hindu Law Books *Daya Bhaga*, Ch. 4, Section I, pp. 23, 24. "Property with unlimited power of alienation" means absolute property.

Under the clause "to make over and divide the whole of my estate both real and personal unto and between my daughters

1. (1896) L R 23 I. A. 18 I. L. R. 23 C. 593.
2. (1897) I.L.R. 24 C. 406.
3. (1906) I. L. R. 33 C. 1306 at p. 1314.
4. (1896) L. R. 23 I. A. 18 at p. 26. I. L. R. 23 C. 563.
5. (1897) I. L. R. 24 C. 646 at p650.
6. (1893) I. L. R. 16 M. 466.
7. (1905) I. L. R. 32 C. 1051.
8. (1886) (1887) I. L R. 11 B. 69, 573.
9. (1895) I. L. R. 21 B. 376.
10. (1892) I. L. R. 17 B. 503.

in equal shares to whom and their respective sons I give, devise and bequeath the same," it is contended by the other side that a gift is made first to the daughters and then to their sons. But this sentence cannot be divided or cut down. Then again, they say that "heirs" would have been used, if an absolute gift to the daughters were meant. But the words "and their respective sons" are words of limitation. There is nothing in the will to show that the sons are to take at or after any event. No period is fixed for the sons to take. The contention on the other side makes this will quite a new will. There is nothing to show that the testator intended that the sons are to take after the death of the daughters. "To whom and their respective sons" would give absolute estate. Reference was made to *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry*;[1] *Ram Lal Mookerji* v. *Secretary of State for India*;[2] *Basanta Kumari Debi* v. *Kamikshya Kumari Debi*;[3] *Lewin* v. *Kelley*;[4] and *Tagore Case*[5].

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De Gruyther, in reply, further referred to *Nagalutchmee Ummal* v. *Gopoo Nadaraja Chetty*[6] and argued that in *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry*[7] and *Ramlal Mookerji* v. *Secretary of State for India*[8] where it was held that absolute estates were given to women, the words used were, as held over and over again, technical words, such as "children and grandchildren" and "from generation to generation." But here such words are absent. In Bengal and Madras the daughters take a qualified estate only—*Chotay Lal* v. *Chunno Lal.*[9] In order to arrive at the true construction the will must be read without the Indian Succession Act. S. 82 of that Act says nothing one way or the other. If an estate for life is given to each of the daughters, the period of distribution would be at the death of the tenant for life, and in that case S. 111 of the Indian Succession Act has no application. If, on the other hand, an estate of inheritance is given, there could be no period of distribution. The true construction is that each of the daughters took a life estate and the sons of the daughters living at the testator's death a vested

1. (1878) L. R. 5 I. A. 138.
2. (1881) L. R. 8 I. A. 46.
3. (1905) L R. 32 I. A. 181.
4. (1888) L. R. 13 A. C. 783.
5. (1872) L. R. I. A. supp. 47.
6. (1856) 6 M. I. A. 309.
7. (1878) L. R. 5 I. A. 138.
8. (1881) L. R. 8 I. A. 46.
9. (1878) L. R. 6 I. A. 15 at p. 31.

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remainder, with a result that the adopted son of the plaintiff's and two sons of the other daughter born after the death of the testator would take nothing.

Brown, with their Lordships' permission, referred to *Mayne* on Hindu Law and Usage (7th ed. p. 900) and *Macnaghten's* Principles and Precedents on Hindu Law (p. 39.)

Their Lordships' judgment was delivered by

Sir Andrew Scoble.—Hurry Dass Dutt, a Hindu inhabitant of Calcutta, died on the 30th October 1875, leaving a will which was admitted to probate by the High Court on the 20th December in the same year. The will was in the English language, and was probably drawn by an English solicitor, who is one of the attesting witnesses.

The only question raised upon this appeal is as to the nature of the estate which, in the events which have happened, the testator's daughters take under the terms of the will.

The clause of the will relating to the daughters is as follows:—

"But in case none of such adopted sons survive my said wife, "or in case of either surviving my said wife and dying under the "said age without leaving a son or sons, I desire and direct my "executors, after the death of my said wife, or the death of such "son after her, but under the age of eighteen years without leaving "a son or sons, to make over and divide the whole of my estate, "both real and personal, unto and between my daughters in equal "shares, to whom and their respective sons I give, devise and be-"queath the same, but should either of my said daughters die with-"out leaving any male issue surviving, but leaving my other "daughter her surviving, then in such case the surviving daughter "and her sons shall be entitled to the share of the deceased daughter "or in the case of the death of either daughter leaving sons, "the share of such daughter is to be paid to such her son or sons, "share and share alike."

Woodroffe J. by whom the case was heard in the first instance held that the intention of the testator was "to benefit the adopted son, and should the provisions (of the will) in this respect in any manner fail, then those who were of his own blood, *viz.*, his daughters"; that the words "and their respective sons" are used as

words of limitation and not of purchase;" and that upon the true construction of the will, the daughters were "each entitled to a moiety of the estate of the testator absolutely." He expressed no opinion, however, as to the right of the parties in the event of the death of one of the daughters leaving no natural son her surviving. Upon appeal to the High Court his judgment, upon these points, was confirmed.

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With great respect for the learned Judges in the Courts below, their Lordships are unable to concur with their decision. This is the will of a Hindu, and as observed by this Committee in the case of *Moulvie Mahomed Shumsool* v. *Shewukram* [1] "in construing the will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate." In spite of the assistance of his English solicitor, it appears to their Lordships that in this case the testator has clearly succeeded in showing that his daughters, whom he incontestably intended to benefit, were not to have more than what is generally known to be a woman's estate in his property. This is established by the gift to them "and their respective sons," and by the proviso that in the event of on of the daughters dying "without leaving any male issue surviving," then the share of the deceased daughter is to go to the surviving daughter and her sons, to the exclusion in both cases of female issue. Moreover, "in the case of the death of either daughter leaving sons, the share of such daughter is to be paid to such her son or sons, share and share alike." No language could more clearly show that the intention of the testator was to exclude his daughters' daughters from the succession to which they would have been entitled under the ordinary Hindu law if their mother's estate had been absolute; and the reason of this is obvious, as the sons of his daughters would be competent to offer funeral oblations to him—the strongest of all possible arguments to an orthodox Hindu.

1. (1874) L. R. 2 I. A. 7 at p. 14.

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The learned Counsel for the respondents strongly relied on S. 82 of the Indian Succession Act, 1865, which provides that "where property is bequeathed to any person, he is entitled to the whole interest of the testator therein, unless it appears from the will that only a restricted interest was intended for him." As already pointed out, it is abundantly clear that, under the terms of the will, only a restricted interest was intended to pass to a daughter dying without male issue.

In the opinion of their Lordships, according to the true construction of the will, the intention of the testator was to create in favour of his daughters an estate for life with a remainder over to their sons, and the learned Judges of the High Court ought to have held that, in the events that have happened, the daughters of the testator, Ranimoni Dossi and Premoni Dossi, are entitled to the testator's estate in equal shares for life and with benefit of survivorship between themselves. They will humbly advise His Majesty that this appeal ought to be allowed and the decree of the High Court varied in accordance with this judgment, and that in other respects the decree ought to be affirmed. Under the circumstances, the costs of the appeal taxed as between solicitor and client, must be paid out of the estate.

Solicitors: *Watkins & Lempriere* for appellants.
Solicitors: *T. L. Wilson & Co.* for respondents.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Miller.

Cangayam Venkataramana Iyer .. Appellant *
(*Plaintiff.*)
v.
Henry James Colly Gompertz and others .. Respondents
(*Defendants.*)

Venkataramana Iyer v. Gompertz.

Mortgage decree, form of—Suit by puisne mortgagee for sale subject to the prior mortgage.

It is the right of the prior mortgagee to require the second mortgagee to redeem him or submit to a sale of whatever interest he holds in the property, and the decree must give effect to this right, unless by doing so it unnecessarily deprives the puisne mortgagee of any right of his own.

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*A. O. S. 99 of 1905. 7th April 1908

Venkataramana Iyer v. Gompertz.

A puisne mortgagee cannot by impleading the prior mortgagee in a suit for sale insist on a decree for sale subject to the prior mortgage.

Ordinarily, in a mortgage suit, when all the interested parties are before the Court, it is the duty of the Court, if it can do so, to make a decree which shall deal finally with the questions between them and shall preclude the necessity of further litigation for the enforcement of any right arising out of the mortgage or mortgages in question in the suit.

The proper decree to be passed in a suit by the puisne mortgagee, when the prior mortgage debt was due on the date of suit, is to allow him to redeem the prior mortgage and sell the estate for both his amount and the redemption amount.

If the mortgage debt was not due on the date of suit, the puisne mortgagee can obtain a decree for sale subject to the prior mortgage.

The puisne mortgagee is bound to pay the whole amount due under the prior mortgage, and not merely the amount paid by the assignee thereof.

S. 96, T. P. A., does not imply that the puisne mortgagee is not required to redeem the prior mortgagee when the latter is a party to the suit.

Semble :—S. 96, T. P. A., is intended to cover cases in which the prior mortgagee is not a party to the suit but intervenes after the decree.

Appeal from the decree of the Court of the Subordinate Judge, Madura West, in O. S. No. 16 of 1903.

T. Subrahmanya Aiyar and *D. M. Krishnaswami Aiyar* for appellant.

J. L. Rosario and T. Rangachariar for respondents.

The Court delivered the following

JUDGMENT :—The principal question in this appeal may be shaped as follows :—

Can the second of the two sucesssive mortgagees, both of whom hold simple mortgages, insist, in a suit to which the prior mortgagee is a party, on obtaining from the Court a decree for sale subject to the prior mortgage ?

It is unnecessary, in considering the question, to decide whether or not the prior mortgagee can make him a party simply to enable the Court to determine what is due to him. In this case the plaintiff has not stated that this was the only purpose for which the prior mortgagee was made a party; he has in fact offered, as an alternative to his first prayer, to accept a decree for redemption of the prior mortgage. It is, of course, the case that the plaintiff could not here avoid making the prior mortgagee a party, for as purchaser in the sale on his mortgage he unites in himself the interests of the mortgagor and mortgagee in the

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property. That, however, does note affect the question. All the interested parties being before the Court it is the duty of the Court, if it can do so, to make a decree which shall deal finally with the questions between them and shall preclude the necessity of further litigation for the enforcement of any right arising out of the mortgage or mortgages in question in the suit. This is the obvious intent of S. 85 of the Transfer of Property Act, and is clearly a desirable and proper intent. It may be that there will be found cases in which the Court will be unable finally to close the matter without doing injustice to the prior or puisne mortgagee (see remarks in Ghose on Mortgages, 3rd edition at p. 738); but those cases must be treated as exceptional and will, no doubt, having regard to the fact that the second mortgagee before advancing his money, knows of his existence and the nature of the burden on the property which must be removed before he can be paid, be very few in comparison with those in which justice can best be done by requiring redemption by the second mortgagee, or directing a sale free of all encumbrances.

Moreover, it is the right of the prior mortgagee to require the second mortgagee to redeem him or submit to a sale of whatever interest he holds in the property—see S. 75 of the Transfer of Property Act—and the decree must give effect to this right, unless by doing so it unnecessarily deprives the second mortgagee of any right of his own.

It is the rule in England that when the prior mortgagee is made a party, the plaintiff must be ready to redeem him (Daniell's Chancery Practice, 7th edition p. 217) and on the original side of this Court it appears to be the ordinary practice to require redemption in such suits (*vide* Form 52, Original Side Rules.)

In America, too, the decree in a suit like that before us will ordinarily lie for redemption by the second mortgagee and then for sale if the prior mortgagee as purchaser of the equity of redemption does not redeem the second mortgage (Jones on Mortgages, S. 1075) and the rule there seems to be that when the prior mortgage is not due at the date of the second mortgagee's suit he can obtain a decree for sale subject to the prior mortgage, but when the prior mortgage is due he may redeem and sell the estate to obtain the redemption money as well as his own claim—Jones, S. 1580.

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This practice not only gives effect to the policy of the law and the rights of the different parties, but also secures for the mortgagor the best chance of obtaining a good price for the property at the sale, and prevents the necessity of further proceedings against the mortgagee; and if it is not in any particular case to be adopted, it is for the second mortgagee to show sufficient reason for making an exception to it. In this case the second mortgagee prefers a sale subject to the prior mortgage, but that is not a sufficient reason.

S. 96 of the Transfer of Property Act does not support the view that the puisne mortgagee is not required to redeem the prior mortgagee when the latter is a party to the suit. The prior mortgagee may no doubt consent to a sale free of encumbrances, but it is not impossible that the section was intended to cover cases in which the prior mortgagee is not a party to the suit but intervenes after the decree, and it does not seem to answer the present question even indirectly.

Mr. Subrahmanya Aiyar relied on *Debendra Narain Roy* v. *Ramtaran Banerjee*,[1] but the point decided in that case was that the right of a puisne mortgagee was not affected by the proceedings taken in a suit to which he was not a party. It was contended that in the absence of a sale in the prior mortgagee's suit the second mortgagee would be entitled to a sale subject to the prior mortgage. Nor does *Ram Shankar Lal* v. *Ganesh Prasad*[2] cover the present case, for it is not there decided what form the decree should take when the prior mortgagee is made a party to the suit.

The decree made by the Subordinate Judge is, we think, substantially correct, but the form of the opening direction "that defendants 9 and 11 do pay to the plaintiff, etc., etc.," is open to the objection that it may be construed as a decree against those defendants personally. It is better to follow the form sketched in S. 86 of the Transfer of Property Act, and commence by declaring the amount due; and the decree in that respect must be altered.

The plaintiff contends next, if we understand Mr. Subrahmanya Aiyar aright, that the amount payable by him for redemption of the prior mortgage, should de calculated not on the mortgage

1. (1903) I. L. R. 30 C. 599. 2. (1907) I. L. R. 29 A. 385.

money, but on the amount paid by the 8th defendant to the original first mortgagee for his rights. No authority was cited for this proposition, and we think it is unsound. The 8th defendant bought the rights of the original mortgagee, and the price which he paid for them is no concern of the plaintiffs. This is not a case in which the plaintiff has to compensate the 8th defendant for a payment made to redeem a mortgage which otherwise the plaintiff would have had to redeem. The mortgage remains, and the plaintiff must redeem it.

The next contention is that all the buildings on the land ought to be included in the decree for sale, and this is, in our opinion, a sound contention. It is clear, we think, that the plaintiff intended to describe all the buildings in the schedule to his plaint and that the 9th and 11th defendants understood that he had done so and framed their defence accordingly. There is no doubt that the plaintiff is entitled as a matter of law to sell all the buildings and the decree must be modified so as to make it clear that he is at liberty to do so.

For the 9th and 11th defendants it is contended that if the plaintiff sells the new buildings they should be compensated under S. 51, Transfer of Property Act, as for improvements made by them in the belief that they were the owners of the land; but S. 51 does not apply to the facts, and *Rangayya Chettiar* v. *Parthasarathi Naicker*,[1] by which we are bound, seems to be on all fours with the present case.

The decree subject to the modifications we have stated, ought to be confirmed. The parties will bear their own costs of the appeal.

Time for redemption will be extended by six months from this date.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—The Honourable Mr. Justice Miller.

S. Subramania Nayanar .. Petitioner* (*8th Defendant.*)

v.

S. Vengu Iyer .. Respondent (*Plaintiff.*)

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* C. R. P. No. 460 of 1907. 28th January 1908.

1. (1896) I. L. R. 20 M. 120.

C. P. C., Ss. 492, 493, 622—Injunction—Trespass to property—Defendant in possession and plaintiff out of possession—Jurisdiction—Revision.

S. 493, C. P. C., has no application when the defendant is in possession and the plaintiff out of possession, and a Court will be acting without jurisdiction if it grants an injunction in favour of a plaintiff out of possession of the property in dispute.

S. 492, C. P. C., has no application when the case is not such a one as is described in the section, *viz.*, waste, removal, etc.

Petition under S. 622 of the Civil Procedure Code and S. 15 of the Charter Act, against order in C. M. A. No. 13 of 1907, presented against the order of the District Munsif's Court of Tinnevelly, in M. P. No. 1817 of 1906 in O. S. No. 565 of 1906.

This is a revision petition against an order in appeal presented against an order granting a temporary injunction to the plaintiff-respondent in a declaratory suit. The plaintiff was one of the dharmakartas of a temple appointed by the Temple Committee of the place. The Temple Committee appointed two others to act conjointly with the plaintiff, and subsequently dismissed the plaintiff from the trusteeship. The plaintiff brought a suit for a declaration of the invalidity of the appointment of additional trustees and the invalidity of his own dismissal, and obtained an interlocutory order of injunction restraining the defendants from interfering with his sole management. He alleged in his plaint that he was in possession of the temple and its properties. But at the date of the order the defendants were in possession of the temple in pursuance of an order of the High Court reversing an order under S. 145, Cr. P. C., passed in favour of the plaintiff by the local magistrate. The defendants also alleged that they were in possession of the lands appertaining to the temple, and one of the issues in the suit itself was whether the plaintiff was in possession, and, if not, whether his suit for a bare declaration will lie.

K. Srinivasa Aiyangar and *S. Srinivasa Aiyar* for petitioner.

A. S. Balasubrahmania Aiyar for respondent.

The Court delivered the following

JUDGMENT :—It has not been clearly decided by either Court which party is in possession of the temple property, or was in possession thereof when the injunction was issued, but the defendants have in their favour a magisterial order directing

Subramania Nayanar v. Vengu Iyer.

possession to be delivered to them, and it is not denied that this order has partially at any rate been obeyed, and that they hold the keys of the outer doors of the building. It is said that the plaintiff is collecting the rents from some tenants, and that others refuse to pay him, so that it is not clear that he is in possession of any part of the property now, whatever may have been the case when the suit was instituted, while it is clear that the defendants have the control of the temple building itself. There is no allegation that the property is likely to be wasted or removed by the defendants, and the case is not therefore within the provisions of S. 492 of the Civil Procedure Code. Nor is it, the defendants being in possession, a case falling within S. 493.

I think the injunction was, in the circumstances, issued without jurisdiction, and I set it aside. If the rents cannot be collected, the appointment of a receiver would appear the appropriate remedy.

The petition is allowed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Munro.

Krishna Pillai .. Appellant* (*1st Defendant*).

v.

Arunachela Chettiar Respondent (*Petitioner*).

Krishna Pillai v. Arunachela Chettiar.

Religious Endowment—Katlai—Purchase of land in the name of Idol—Deed in the custody of donor—No reservation—Power to appoint manager of the katlai.

A person who absolutely makes a gift of land for the purpose of a katlai in favor of an idol, without reserving any rights whatever, cannot subsequently appoint a manager for the katlai.

Held also that the fact that the donor retained the deed of gift with herself was not sufficient evidence of any reservation of the power to appoint a manager in the donor.

The conduct of the parties years after the execution of a deed is of no avail in construing the deed.

Second appeal from the decree of the District Court of Tanjore, in A. No. 423 of 1906, presented against the decree of the Court of the District Munsif of Tiruvalur, in O. S. No. 40 of 1905.

* S. A. No. 850 of 1906. 18th March 1908.

Krishna Pillai v. Arunachela Chettiar.

The suit was for recovery of certain lands by the manager of a katlai. The defendant pleaded that the plaintiff had no right to sue, not being the trustee of the temple, and that the defendant held the land under the trustee. One Minakshi originally bought the lands in the name of the Idol with her own for the purpose of a katlai for feeding Brahmins on the occasion of certain festival. She retained the deed herself, but allowed the then trustee of the temple to manage the katlai. After the trustee's death, she nominated plaintiff as the manager of the katlai. The question in the case was whether she had the power to do so.

T. R. Ramachandra Aiyar for appellant.

S. Srinivasa Aiyar for respondent.

The Court delivered the following

JUDGMENT:—Exhibit *E* is in terms an absolute sale in favor of the temple, that is to say, an absolute gift by Minakshi to the temple, of property bought by her from Visvanatha Chetty. The fact that she is permitted to retain the instrument cannot, we think, be taken as sufficient to show that she also retained the ownership of the land. The deed is quite clear, and the evidence of the subsequent conduct of the parties, many years after its execution, cannot assist us in construing its language or terms.

Minakshi made over the lands absolutely to the temple, and had no power to give the plaintiff by Exhibit *E* any right of management of it.

We must, therefore, reverse the decrees of the Courts below and dismiss the suit with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Sankaran Nair.

Piramanayagam Pillai and others .. Appellants * (*Defendants*).

v.

Alwar Naicker .. (Respondent). *Plaintiff*).

* S. A. No. 850 of 1905. 14th February 1908.

Piramanayagam Pillai v. Alwar

C. P. C., S. 317—No bar to suit against assignee from certified purchaser.

S. 317, C.P.C., is no bar to a suit against an assignee from the certified purchaser.

[*Theyyavalam* v. *Kochan* 1 followed.]

Second appeal from the decision of the District Court of Tinnevelly in A. S. No. 308 of 1904 presented against the decree of the District Munsif's Court of Satur in O. S. No. 98 of 1903.

Joseph Satya Nadar for appellants.

S. Srinivasa Aiyer for respondent.

The Court delivered the following

JUDGMENT :—The point that the decrees of the lower Courts cannot be supported in view of the express provisions of the first part of S. 317 of the Code of Civil Procedure was not taken in the Courts below or in the memorandum of appeal to this Court. Assuming it is open to the appellants in these circumstances to take this point in second appeal, on the authority of *Theyyavalam* v. *Kochan*[1] the first part of the section does not apply since the present suit is not against the certified purchaser. As regards Exhibit *A*, it is no doubt a piece of evidence which suggests that the original purchase by Sundaram Pillai was not benami, but the District Judge came to the conclusion that, notwithstanding this piece of evidence, the original purchase by Sundaram Pillai was *benami* on behalf of the plaintiff's predecessor in title. This is a finding of fact.

The second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis and Mr. Justice Munro.

Chama Swami and another .. Appellants*
v. (*Defendants*).
Padala Ananda and another .. Respondents
(*Plaintiffs*).

Chama Swami v. Padala Ananda

Mortgage—Subrogation—Payment of mortgage amount by vendee whose title has been subsequently found invalid.

A vendee who while in possession of the property purchased paid off a mortgage on the same but whose purchase was subsequently held invalid, is entitled to be reimbursed with the amount paid by him in discharge of the mortgage.

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* S. A. No. 213 of 1906. 8th April 1908.

1. (1897) I. L. R. 21 M. p. 7.

[*Syamalarayadu* v. *Subbarayadu*1 followed, *Dakhina Mohan Roy* v. *Saroda Mohan Roy*t and *Peruvian Guano Co* v. *Dreyfus*3 referred to.]

Chamu Swami v. Padala Ananda

Second appeal from the decree of the Subordinate Judge's Court of Coconada, in A. S. No. 37 of 1906, presented against the decree of the Court of the District Munsif of Amalapur in O. S. No. 462 of 1904.

P. Narayanamurti for appellants.

P. Nagabhushanam for respondents.

The Court delivered the following

JUDGMENT :—The plaintiffs in this case, according to the finding of the lower appellate Court, purchased certain lands by a sale-deed dated 21st July 1899, which was afterwards registered, and on the 24th August 1899 redeemed a mortgage on the property. The plaintiffs' purchase was afterwards held invalid as against defendants 3 to 6, and under these circumstances the plaintiffs have brought the present suit to recover from defendants 3 to 6 the money due on the mortgage which they paid off whilst in possession of the property under the sale deed in their favour. Both the lower Courts have given a decree in the plaintiffs' favour on the authority of *Syamalarayadu* v. *Subbarayadu*[1] the facts in which closely resemble those in the present case. In the argument before us it was not seriously argued that the present case was distinguishable; but it was said that the decision in *Syamalarayadu* v. *Subbarayadu*[1] was wrong. We are unable to agree with this contention. Although no authorities are cited in *Syamalarayadu* v. *Subbarayadu*[1] we think that the learned judges who decided the case must have had their attention called to the decision of the Privy Council in cases of this kind and have proceeded on the authority of those cases. In the well-known case of *Gokaldas Gopaldas* v. *Puranmal Premsulkhdas*[4] their Lordships of the Judicial Committee pointed out that what we have to look to in India are not the technical rules of English Equity as settled by the authority of decided cases, but only such of those rules as rest upon broad intelligible principles of justice and can be applied as part of the law of justice, equity and good conscience; and accordingly their Lordships refused to apply the ruling in *Toulmin* v. *Steere*[5] to India. In a later case *Dakhina Mohan Roy* v. *Saroda Mohan Roy*[2], Lord *Macnaghten* delivering the judgment of their Lordships, referred to the case of

1. (1897) I. L. R 21 M. 143. 2 (1893) I. L. R. 21 C. 142.
3. (1892) A. C. 166. 4. (1884) I. L. R. 10 C. 1035.
5. (1817) 3 Mer. 210.

The Peruvian Guano Co. v. *Dreyfus*[1] in which he had himself criticized the English decisions that parties who have no right to property cannot acquire a lien by expending moneys in connection with it, and observed that after the decision in *The Peruvian Guano & Co.* v. *Dreyfus*[1] it would be hard to maintain as a proposition admitting of no exceptions that a person who is in wrongful possession is not entitled to recover sums paid on account of outgoings. In that case their Lordships held that the plaintiff was not in wrongful possession at the time he paid the Government revenue which he was seeking to recover as he was at the time in possession under the decree of a competent Court which was afterwards reversed; but at the close of the judgment his Lordship speaks of the claim as being in the nature of salvage, and observes that the Indian Statute Law recognizes an equity to repayment in the case of a person who not being proprietor pays the Government revenue in good faith to support a claim which afterwards turns out to be unfounded. In *Syamalarayudu* v. *Subbarayadu*[2] the action of the plaintiff in paying off a mortgage on the property was considered to have been made in good faith in spite of the fact that he was claiming under a sale-deed which had been antedated for the purpose of supporting his title. For the appellant we have been referred to the recent decisions of the Calcutta High Court—*Gurudeo Singh* v. *Chandrikah Singh* and *Chandrikah Singh* v. *Rashbehari Singh*[3] in which the American authorities are considered, but we do not think they help the appellant. The American Courts apply to cases of this kind an equitable doctrine of subrogation borrowed from the Civil Law, and when equity requires it allow persons paying off mortgages on properties which do not belong to them to be subrogated to the rights of the original mortgagees. This right of subrogation is not extended to mere volunteers who pay off other people's debts without having any concern in them. This was held by the Supreme Court in *Etna Life Insurance Company* v. *Middleport*,[4] but in the course of their judgment in that case the learned judges cite with approbation a passage from Shelden on *Subrogation* in which subrogation is allowed as a matter of right for the benefit of a purchaser who has extinguished an encumbrance on the estate which he has purchased.

1. (1892) A. C. 166.
2. (1897) I. L. R. 21 M. 143
3. (1907) 5 C. L. J. 611.
4. (1887) 124 U. S. 525.

We think this is the right principle to apply especially where, as in the present case, the plaintiffs were in possession when they paid off the mortgage.

Under these circumstances we agree with the lower Courts, and dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

FULL BENCH.

Present:— Sir Charles Arnold White, *Kt.*, Chief Justice, Mr. Justice Wallis, and Mr. Justice Sankaran Nair.

Rangappa Naik .. .. Appellant*
v. (*5th Defendant*).
Kamti Naik and others .. .. Respondents (*Plaintiffs* 1 *and* 2, *and Defendants* 8, 9, 10, 2, 4 *&* 6).

Rangappa Naik v. Kamti Naik

Hindu Law—Widow's-estate—Release by reversioners in favor of a widow—Validity—Alienation by widow—Partial alienation, validity—Estoppel.

The presumptive reversioners of a widow's estate in consideration of a grant of certain portion of the estate to them renounced all their interest in the remainder of the estate and consented that the widow may dispose of it in any manner she pleased.

Per *Curiam.—Held*—That the sons of the executants of the deed who happened to be the actual reversioners were estopped from disputing the validity of the alienations made by the widow in virtue of the release given by their father.

Per *Chief Justice* and *Wallis* J. (*Sankaran Nair* J. *contra*).—The release given by the reversioners of their reversionary rights in the estate is not valid.

Per *Sankaran Nair* J.—The release is good as being a valid surrender of the whole estate to the reversioners and a reconveyance by them to the widow.

Per *Chief Justice* and *Sankaran Nair* J. (*Wallis* J. *contra*).—A partial surrender by the widow or an alienation of part of the estate by the widow with the consent of the next reversioners is invalid.

Second Appeals from the decrees of the Court of the Subordinate Judge of Tuticorin in A. S. Nos. 234 and 240 of 1903 respectively, presented against the decrees of the Court of the District Munsif of Satur in O. S. Nos. 212 and 206 of 1902, respectively.

Their Lordships made the following

ORDER OF REFERENCE TO A FULL BENCH:—One Sankarappa Naik died in 1849 leaving two widows. In 1850 the

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* S. A. Nos. & 1168 1250 of 1904. 12th March of 1908.

Rangappa Naik v. Kamti Naik.

three brothers of Sankarappa Naik who were the whole body of persons constituting the next reversion executed a document, Exhibit *IV*, by which they said that they had nothing to do with the estate of the widows inherited from their husband and consented to their leaving it to any one they liked. The widows having died, these suits have been brought by the actual reversioners to recover portions of the estate. It is contended that by reason of the release contained in Exhibit *IV* the plaintiffs cannot maintain the suits, and reliance is placed upon the latest decision of the Privy Council reported in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*.[1] According to that decision, ordinarily the consent of the whole body of persons constituting the next reversion is sufficient to validate an alienation by a widow. This being so, it is difficult on principle to see how, if the whole body of persons constituting the next reversion consents to a widow doing what she likes with the property inherited from her husband, the actual reversioners at the death of the widow can lay any claim to the property.

We, therefore, refer to the Full Bench the question whether, in the face of Exhibit *IV*, the plaintiffs can maintain their suits. We make this reference because the case is not, so far as we are aware, governed by any clear anthority and because the matter involved is one of great general importance.

M. B. Doraiswami Aiyangar for *A. K. Sundaram Aiyar* for appellant in S. A. No. 1158 of 1904.

Joseph Satya Nadar for appellants in S. A. 1250 of 1904.

T. T. Thiruvenkatachariar for *V. Krishnaswami Aiyangar* for 3rd and 4th respondents in S. A. 1158 of 1904 and 1st and 2nd respondents in S. A. 1250 of 1904.

The facts and the question for determination are fully set out, so far as they are necessary for the purpose of this report, in the Order of Reference.

Sankaran Nair J.—In the Privy Council case *Bajrangi Singh* v. *Manokarnika*[1] the judgment is that the consent of all the reversioners should be taken as evidence of the propriety of the alienation of the widow.

J. S. Nadar.—That the consent should be taken not only as evidence, but as validating an alienation even if it be otherwise not

1. (1907) 12 C. W. N. 74.

Rangappa Naik v. Kamti Naik.

binding on the estate. I submit that the consent enables her to give an absolute estate; there was a complete surrender in favour of the widow. [*Court.*—The reversioners had nothing to surrender. Your case is one of alienation? Were there any other reversioners, other than the consenting reversioners at the date of the alienation?] There is no evidence of that. [*Sankaran Nair* J.—Were *all* the properties alienated or only *some*?] In S. A. 1250, the alienations (sales) were for Rs. 500, in 1883, by Parvatammal, the junior widow, of the whole of her properties, (which was half of the whole,) that came to her in the partition with the senior widow. By Ex. *IV* in 1850 express consent was given by the reversioners to the widow "to do what she liked with the property." It does not matter whether other reversioners were born after the date of consent and before sale. [*C. J.*—The consent of the reversioner continues until it is exercised. Is there any case in which a consent once given was availed of at a later period? *Marudamuthu* v. *Srinivasa*[1] lays down that an alienation of a part of the estate is bad on the ground that the widow could surrender only the whole and not a part as held in *Behari* v. *Madho Lal.*[2]] That cannot be good law after *Bajrangi Singh* v. *Manokarnika Buksh Singh.*[3] [*C. J.*—Yet the Privy Council cite a passage from *Marudamuthu* v. *Srinivasa.*[1]] Only on the question of quantum of consent and not as to whether a part alone could or could not be alienated; *vide Vinayak* v. *Govind.*[4]

T. T. Tiruvenkatachariar for respondent in both appeals.—In the Privy Council case, *i e.*, *Bajrangi Singh* v. *Manokarnika Buksh Singh*[3], the question was not as to whether part could be alienated. [*Wallis J.*—Then on what principle is a widow debarred from alienating a part?] Alienation of the whole is supportable on the principle of surrender of widow's estate and acceleration of that of the reversioners. The ruling of the Privy Council in *Behari Lal* v. *Madho Lal*[2] is unaffected by *Bajrangi Singh's case*[3].

[*Sankaran Nair* J.—When was the gift made in the other case—S. A. 1158 of 1904?]

M. B. Doraiswami Aiyangar for *A. K. Sundara Aiyar* for appellant in S. A. 1158 of 1904.—The alienation was made about the year 1862, some time before her death, by the senior widow; it

1. (1897) I. L. R. 21 M. 128 (F.B.)
2. (1891) I. L. R. 19 C. 236 (P.C.)
3. (1907) 12 C. W. N. 74 (P.C.)
4. (1900) I. L. R. 25 B. 129, 134.

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was of her half.] In the Privy Council Case of *Bajrangi Singh* v. *Manokarnika Buksh Singh*[1] the whole of the widow's estate was alienated by three deeds and therefore there was no question as to whether part alone could be alienated. See the beginning of the judgment. Surrender must be of the whole. With regard to alienation, the principle must be the same. Ex. *IV* gives the widow power only to bequeath and not to alienate. [*Sankaran Nair* J.—Yes. (to *Joseph Satya Nadar.*) Where is anything in that document giving the widow a right to alienate? *C. J.*—At the utmost what it says is that the reversioners will have nothing more to do with the estate of the widow. *Court.*—If it is a transfer of the reversioners' right it is void. *Sankaran Nair* J.—(*to Joseph Satya Nadar*). In order to bring the case within the principle laid down in *Bajrangi Singh's case*[1] you must show a consent to alienate. *C. J.*—(to *T. T. T.*) Why should we not construe the words "we consent to your leaving it after your lifetime to anybody you like" as a consent to alienate?] *T.T.T.*—Consent to alienate cannot be implied. There must be express power to alienate—*Bhujanga* v. *Ramayamma.*[2] No power to alienate and no absolute estate are given by Ex. *IV*—*Ramasami Naick* v. *Ramasami Chetti*[3]. *Bahadur Singh* v. *Mohar Singh*[4] shows that the reversioners have only a *spes successionis.* [*C. J.* to *Joseph Satya Nadar.*—Under Ex. *IV* no estate is created by reversioners in favour of the widow.]

J. S. Nadar.—That was never my argument. I only argued that consent to alienate was given by Ex. *IV.* [*Wallis* J.—Only after the death of widow?] There is no necessity for the reversioners to give any consent to enable her to alienate during her lifetime. Their consent is necessary only to give full title to the purchaser, after the widow's death. "You shall enjoy for ever; we consent to your leaving the property after your death to anybody you like" gives her power to alienate for consideration during her lifetime with absolute rights. [*Wallis* J.—You are straining the meaning of Ex. *IV.* *C. J.*—The question here is one of construction of Ex. *IV.*]—Power to dispose of by will includes power to alienate.

T. T. Tiruvenkatachariar.—It appears from the judgment of the Privy Council itself that the whole estate passed by the

1. (1907) 12 C. W. N. 74 (P.C.)
2. (1884) I. L. R. 7 M. 387.
3. (1907) I. L. R. 30 M. 255.
4. (1901) I. L. R. 24 A. 94 (P.C.)

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alienations. [*Wallis* J.—Does the Calcutta High Court say that a part alone cannot be alienated ?] Yes—*Radha Shyam Sircar* v. *Joy Ram Senapati.*[1] This is a case of partial alienation which has been held to be invalid by the Calcutta Court. [*C. J.*—What does *Behari Lal* v. *Madho Lal*[2], say ?] That is a case of surrender of the whole. A surrender and alienation are put on the same footing. [*Wallis*, J.—According to *Varjivan Rangi* v. *Ghilji*[3] alienation of part is allowed if with consent of all reversioners]. See *Hem Chunder Sanyal* v. *Sarnomoyee Devi*[4] and *Narasimham* v. *Madhavarayudu.*[5] [*Wallis* J.—In *Vinayak* v. *Govind*[6] a text is quoted which holds that partial alienation is valid. *C. J.*—*Vajivan* v. *Ghilji*[3] does not seem to be a case of partial alienation.] *In Bahadur Singh* v. *Mohar Singh*[7] and *Shamsundar Lal* v. *Achankunwar*[8] those very persons who gave the consent disputed the alienations afterwards. The alienations being in respect of only a portion of the estate, they were held invalid. See also *Govinda Pillai* v. *Thayammal*[9].— Decisions on alienations are not binding on actual reversioners.— *Vide Narasimham* v. *Madhavarayudu*[5]—a case of an agreement between the widow and the next reversioner to give her the full estate. The facts were exactly the same as in the present case—*Minakshi* v. *Rajam*[10]; *Sriramulu* v. *Andalamal*[11]. A surrender to the next reversioner must be complete—*Pindiprolu Surapparaj* v. *Pindiprolu Virabhadrudu*[12]; *Ramasami Naik* v. *Ramasami Chetti.*[13] In *Shamsundar Lal* v. *Achankunwar*[8] the Full Bench decision in *Ramphal Rai* v. *Tula Kuari*[14] was considered. It says renunciation must be absolute. S. 6 of T. P. Act prohibits a sale by reversioner of his reversionary right—*Ramasami Naik* v. *Ramasami Chetti.*[13] [*C.J.*—Cannot a general consent to a possible future sale be valid ?] It cannot be, for then the reversioner would be giving up his reversionary interest, *i. e.*, it would be giving the widow an absolute estate. Any such contract would not bind successors—*Bahadur*

1. (1890) I. L. R. 17 C. 896,
2. (1891) I. L. R. 19 C 236.
3. (1881) I. L. R. 5 B. 563.
4. (1894) I. L. R. 22 C. 354.
5. (1903) 13 M. L. J. 328.
6. (1900) I. L. R. 25 B. 129, 134.
7. (1901) I. L. R. 24 A. 94. (P C.)
8. (1898) I. L. R. 21 A. 71 (P.C.)
9. (1905) I. L. R. 29 M. 120.
10. (1901) 11 M. L. J. 335.
11. (1906) I. L. R. 30 M. 145.
12. (1907) I. L. R. 30 M, 486.
13. (1907) I. L. R. 30 M. 255.
14. (1883) I. L. R. 6 A. 116 (F. B.)

Rangappa Naik v. Kamti Naik.

Singh v. *Mohar Singh.*[1] Consent must be to a present alienation.

J. S. Nadar in reply.—From *Bajrangi's case*[2] it does not appear that the whole which descended to the widow was alienated. *Marudamuthu Nadan's case*[3] is wrongly decided. [*Wallis* J.—" Alienated the whole estate" means the whole of the widow's estate]. That is, widow's estate in the property alienated. She can still retain other properties. [*C. J.*—This view was not accepted in *Marudamuthu Nadan's case*[3]; see also *Nobokishore Sarma Roy* v. *Harinath Sarma Roy.*[4]] *Mitter's* J.'s *judgment* in *Radhan Shyam Sircar* v. *Joy Ram Senapati*[5] is against me. But it is not followed in *Marudamuthu's case*[3] though referred to in the argument, and its effect is taken away by *Hem Chunder Sanyal* v. *Sarnomoyee Debi*[6]. *Vinayak* v. *Govind*[7] cited the text of the Hindu Law. S. 6 of T. P. Act has no application. [*C. J.*—Have you any case where a general consent for a future alienation was held valid ?] No.

The Court delivered the following

OPINIONS :—After citing the Order of Reference the Chief Justice went on as follows :—

The document is not altogether easy to construe, but I read it as a release to the widow by the reversioners of their reversionary interest in consideration of the widow conveying to them her interest in a portion of the property. I do not think the document can be construed as extinguishing the whole of the widow's estate and unless the whole of the estate is extinguished, the surrender in my view of the law is not effective. This was expressly decided by the Privy Council in *Behari Lal* v. *Madho Lal Ahir Gayaval*,[8] and I do not think this decision is affected by the judgment of the Privy Council in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh.*[2] In *Marudamuthu Nadan* v. *Srinivasa Pillai*[3] the principle of the decision of the Privy Council in *Behari Lal* v. *Madho Lal Ahir Gayawal*,[8] was applied by a Full Bench of this Court in a case where the widow had alienated a portion of her estate to a third party with the consent of the nearest

1. (1901) I. L. R. 24 A. 94 (P.C.)
2. (1907) 12 C. W. N. 74.
3. (1897) I. L. R. 21 M. 128.
4. (1884) 10 C. 1102 (F. B.)
5. (1890) I. L. R. 17 C. 896.
6. (1894) I. L. R. 22 C. 354.
7. (1900) I. L. R. 25 B. 129, 134.
8. (1891) I. L. R. 19 C. 236.

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reversioner for the time being. The decision of this Court in *Marudamuthu Nadan* v. *Srinivasa Pillai*[1] was recently considered by the Privy Council in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh*,[2] and was cited with approval, and although the question before their Lordships of the Privy Council was the general question of the right of a Hindu widow in the absence of legal necessity to alienate property with the consent of the next reversioners, I can find nothing in their judgment to indicate that they were of opinion that the right was free from the qualifications or restrictions that the whole limited estate must be withdrawn. Although in the Privy Council case, to which I have referred, the facts are not quite clear, and although the alienations were no doubt made piece-meal, I think it must be taken that at the time it was sought to impeach the alienations by the widow the whole of the widow's estate had been alienated with the consent of the reversioners. Both in the case of an alienation to a third party with the consent of the reversioners and in the case of surrender to the reversioners, it seems to me as the law now stands—in this Presidency at any rate—the surrender or the alienation to be effective must comprise the whole of the limited estate. It might, no doubt, be reasonably contended that the rule laid down by the Privy Council in *Behari Lal* v. *Madho Lal Ahir Gayawal*[3] would be satisfied if the widow, with the consent of the reversioners, surrendered absolutely her entire interest in a particular part of the inheritance, but this contention was urged before the Full Bench in *Marudamuthu Nadan* v. *Srinivasa Pillai*[1], and the Court declined to accede to it—see the judgment of *Shephard* J. on page 132.

Further I do not think that the Privy Council in their recent judgment to which I have referred (*Bajrangi Singh* v. *Manokarnika Bukhsh Singh*[2],) intended to hold that the reversioners could, with a view to enable the widow to give an absolute title to property inherited from her husband, give the widow a general release of their reversionary right. I do not think the decision of this Court in *Manickam Pillai* v. *Ramalinga Pillai*,[4] which followed the Privy Council decision in *Bahadur Singh* v. *Mohar Singh*[5]

1. (1897) I. L. R. 21 M. 128.
2. (1907) 12 C. W. N. 74.
3. (1891) I. L. R. 19 C. 236.
4. (1905) I. L. R. 29 M. 120.
5. (1901) I. L. R. 24 A. 94.

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and in *Narasimham* v. *Madhavarayudu*[1] which was decided in accordance with the view taken by the Calcutta High Court in *Hem Chunder Sanyal* v. *Sarnamoyi Debi*[2] is affected by the judgment of the Privy Council in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh.*[3]

This being my view with regard to the effect of a general release by reversioners of the reversionary rights with a view to prospective alienations by the widow, and with regard to a surrender by a widow to reversioners, or an alienation to third parties with the consent of the reversioners which does not comprise the whole of the widow's limited estate, my answer to the question which has been referred to us would, apart from any question of estoppel, be in the affirmative. But as regards this question of estoppel we are, I think, bound by the judgment of the Privy Council in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh.*[3] In the last sentence of this judgment their Lordships observe that the appellants (*i. e.*, the reversioners who sought to have the widow's alienations set aside) who claimed through the reversioners who consented must be held bound by the consent of their fathers. There may be a difficulty in reconciling this statement of the law by the Privy Council on the question of estoppel with the judgment of the Privy Council in *Bahadur Singh* v. *Mohar Singh*[4] (see *Bhagwanta* v. *Sukhi*[5]; *Govinda Pillai* v. *Thayammal*[6]); but as the last pronouncement of the Privy Council upon the question I think it is our duty to follow it. As regards this question of estoppel, I do not think the present case can be distinguished on the facts from *Bajrangi Singh* v. *Manokarnika Bakhsh Singh.*[3] It seems to me the estoppel must be held to be good in a case where the consent is given *bona fide* and for good consideration with respect to future alienations.

I would, therefore, answer the question which has been referred to us in the negative.

Wallis J. :—Two questions appear to me to be involved in this reference, first whether if the next reversioners execute a deed such as Ex. *IV* by which in consideration of a grant

1. (1908) 18 M. L. J. 323. 2. (1894) I. L. R. 22 C. 354.
3. (1907) 12 C. W. N. 74. 4. (1901) I. R. 29 I. A. 1; 1 S. C. 24 A. 94.
5. I. L. R. 22 A. 33. 6. (1904) I. L. R. 28 M. 57.

of a certain portion of the estate to them, they renounce all interest in the remainder of the estate and consent that the widow may dispose of it in any manner she pleases after her death, this transaction has the effect of validating alienations of such estate subsequently made by her to third parties, and secondly if it has not, whether the heirs of the reversioners who were parties to the deed and received consideration for executing it are estopped from questioning it.

The first question must, in my opinion, be answered in the negative. Ex. *IV* appears to me to be a conveyance by way of release to the widow of the reversion by the next reversioners. It has been held by *Benson* and *Bhashyam Aiyangar* JJ. in *Narasimham* v. *Madhavarayudu*[1] that reversioners cannot surrender their reversionary interest to the widow so as to vest the estate and there is a decision to the same effect in *Hem Chunder Sanyal* v. *Sonnomoyi Debi*.[2] If Ex. *IV* is something less than a conveyance by way of release to the widow the case appears to me to be even stronger. I know of no authority at all in favour of the view that the next reversioners can confer an unrestricted prospective power of alienation on the widow. Even the observation of *Garth* C.J. in *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy*[3] that "if it is once established in law that a widow may relinquish her husband's estate in favour of her husband's heir for the time being it seems impossible to prevent any alienation which the widow and the next heir may agree to make" does not go so far as to authorise alienations made without the consent or knowledge of the next reversioners pursuant to a general consent given previously. Nor does *Mitter* J. go any further when he says that "if a widow is competent to relinquish her estate to the next male heir of her husband it follows as a logical consequence that she can alienate merely with his consent without a legal necessity." The objections to the view of these learned Judges by which the reversioner's power to validate alienations by the widow is derived from the widow's power to accelerate the reversioner's succession by extinguishing her own estate in his favour have been forcibly pointed out in *Hem Chunder Sanyal* v. *Sornomoyi Debi*.[2] (See also Mayne's note on this case). In this last case the Court treated two deeds by one of which the

1. (1908) 18 M. L. J. 323. 2. (1894) I. L. R. 22 C. 354.
3. (1884) I. L. R. 10 C. 1102.

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widow transferred her entire interest in the estate to the reversioner, while by the other the reversioner in turn conveyed a portion of the estate to her in full ownership as a mere "contrivance" to convert the qualified estate of the widow into an absolute estate to be enjoyed by her free from all restraint on alienation, and held the contrivance void. To allow a widow to use the power of accelerating the reversioner's estate as a means of enlarging her own estate or effecting alienations to third parties would in my opinion be opposed to well-known equitable principles which seem to me to be as applicable in India as in England. It is well established that the donee of a limited power "must exercise it *bona fide* for the end designed, otherwise the execution is corrupt and void". *Aleyn* v. *Belchier*[1]; *Farwell* on *Powers*, p. 403, (II Edition). Consequently the exercise of a power for the purpose of obtaining a personal advantage for the donee of the power or effecting any other indirect object has always been held bad. The decision of this Court in *Narasimham* v. *Madhavarayadu*[2] and of the Calcutta High Court in *Hem Chunder Sanyal* v. *Sornomoyi Debi*,[3] may, I think, be regarded as applications of this doctrine, as may also it seems to me, the decision of their Lordships of the Privy Council in *Behari Lal* v. *Madho Lal Ahir Gayawal*[4] that the widows' power of accelaration to be validly exercised must relate to the whole estate without any reservation in her own favour. Whatever difficulty there may sometimes be in preventing the improper exercise of the power of acceleration it surely cannot be satisfactory to make the possibility of the improper exercise of this power by the widow the foundation on which the power of the reversioner to validate the widow's alienations to third parties must rest. The Bombay High Court has constantly refused to treat the reversioner's power to validate as derived from the widow's power to accelerate; the former has the authority of Hindu texts and is analogous to the power of sapindas to consent to an adoption, the latter would appear to be based upon an application of the English doctrine of merger. The Full Bench decision of this Court in *Marudamuthu Nadan* v. *Srinivasa Pillay*[5] does not I think support the view that the widow's power of acceleration is sufficient to cover any contrivance which the widow

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1. W. & T. L. C. p. 812 (7th Ed.)
2. (1903) 13. M. L. J. 323.
3. (1894) I. L. R. 22 C 354.
4. (1891) I. L. R. 19 C. 236. (P. C)
5. (1897) I. L. R. 21 M. 128

and the next reversioner may enter into to the prejudice of remoter reversioners, as it was held that they could not validate the alienation by the widow of a portion only of her estate. Further in so far as, following *Nobokishore Sarma Roy* v. *Hari Nath Sarma Roy*[1] the Full Bench derive the reversioner's power to validate from the widow's power to accelerate, this view is not, in my opinion, supported by the decisions of the Privy Council, while the actual decision of the Full Bench that a reversioner cannot validate the alienation by the widow of a part of the estate appears to be opposed to the recent decision of their Lordships in *Bajrangi Singh* v. *Manokarnika Bakhsh Singh.*[2] So far as I can see, their Lordships appear to treat the widow's power of acceleration and the reversioner's power of validating the widow's alienation as distinct and independent powers.

In *Collector of Masulipatam* v. *Cavaly Vencata Narrainapah*[3] it is said to be established that "an alienation not otherwise legitimate may become so if made with the consent of her husband's kindered." Neither here nor in the similar observations in *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhary*[4] do their Lordships make any reference to the widow's power of accelerating the reversion as having any bearing on the reversioner's power of validating an alienation. On the other hand, when dealing with the widow's power of accelerating the reversion, in *Behari Lal* v. *Madho Lal Ahir Gayawal*[5] their Lordships make no reference to the reversioner's power of validating alienations and their Lordships' decision does not appear to affect the latter power except in so far as it shows that the widow's power of acceleration must be exercised *bona fide* and for the end designed. In the Full Bench case in *Marudamuthu Nadan* v. *Srinivasa Pillai*[6] *Shephard* J. who delivered the judgment of the Court on this part of the case when holding that the reversioner's power of validation must be derived from the widow's power of acceleration and must be regarded as subject to the same condition as the widow's power of acceleration had been subjected to in *Behari Lal* v. *Madho Lal Ahir Gayawal*[5] was obliged to put aside as mere *dicta* the observations referred to above of their Lordships in

1. (1884) I. L. R. 10 C. 1102.
2. (1907) 17 M. L. J. 605.
3. (1860) 8 M. I. A. 500 at 551.
4. (1869) 13 M. I. A. p. 209 at 228.
5. (1891) I. L. R. 19 C. 236.
6. (1897) I. L. R. 21 M. 128.

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Collector of Masulipatam v. *Cavaly Vencata Narrainapah*[1] and *Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry*[2] in which there is no suggestion that the power of validation is derived from the power of acceleration and no suggestion that the power of validation can only be exercised by the reversioner in cases where the whole estate has been alienated. These observations which, in my opinion, clearly contemplate the validation by the reversioner of partial alienations are again taken by their Lordships in the recent case in *Bajrangi Singh* v. *Manokarnika Baksh Singh*[3] as their starting point in dealing with the reversioner's power to validate alienations, and on the other hand the decision of their Lordships in *Behari Lal* v. *Madho Lal Ahir Gayawal*[4] as to acceleration is not referred to as having any bearing on the validation of alienation by the reversioner. The point to which their Lordships' attention appears to have been mainly directed is whether the consent of the remote as well as of the next reversioners is necessary to validate an alienation, and as throwing light on this question they consider whether the consent of the remote reversioners is necessary to support an acceleration in favour of the next reversioners as held in Allahabad, or is unnecessary as held in Calcutta and Madras. When citing the observations of *Subramania Aiyar* J. in *Marudamuthu Nadan* v. *Srinivasa Pillai*[5] to show that in Madras the consent of the remote reversioners is unnecessary to support an acceleration in favour of the next reversioners and that all that is necessary is that the whole estate should be surrendered by the widow, their Lordships omit the concluding words of the passage in which the learned Judge laid down that in case of an alienation with the consent of the next reversioners it was equally necessary that the whole estate should be alienated by the widow and that a partial alienation would be invalid. In the case before their Lordships the widow had made five successive alienations of portions of her husband's estate and had afterwards procured the consent of the next reversioners to those alienations. These five alienations comprised the whole of the estate, but their Lordships nowhere refer to this fact as having any bearing on the question of the validity of these alienations. On the contrary, their Lordships appear to hold

1. (1860) 8 M. I. A. 500. 2. (1869) 13 M. I. A. 209.
3. (1907) 17 M. L. J. 605. 4. (1891) I. L. R. 19 C. 236.
5. (1897) I. L. R. 21 M. 128.

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that these five successive deeds of partial alienation were respectively validated by the subsequent ratification of the next reversioners.

If, therefore, it were necessary to decide the point, I should be disposed to hold that the effect of the recent decision is to overrule the Full Bench decision in *Marudamuthu Nadan* v. *Srinivasa Pillai*[1] and to lay down that even partial alienations by a widow are valid when made with the consent of the next reversioners. It is, however, enough for me to say that this and the previous decisions of the Privy Council appear to be opposed to the view that the reversioner's power to validate any alienation is derived from the widow's power to accelerate succession in his favour, and also opposed to the view that because the widow can accelerate the estate of the next reversioner by extinguishing her own, therefore any contrivance which the widow and the next reversioners may enter into to defeat remoter reversioners will be supported. Unless the latter proposition can be supported, there is, in my opinion, no ground for holding that a renunciation such as to be found in Ex. *IV* by the next reversioners of their interest in the reversion coupled with a statement that the widow can leave the estate to any one she likes after her death, can have the effect of validating alienations of the estate subsequently made by the widow to third parties without the express consent and even apparently without the knowledge of the next reversioners. I would, therefore, answer the first of the two questions referred to at the beginning of this judgment in the negative. The remaining question appears to me to be concluded by the recent ruling of their Lordships. It had there been found that the next reversioners had received consideration for ratifying the alienations previously made by the widow, and had in fact been paid to execute the deeds of ratification. Under these circumstances, their Lordships held that the appellants who claimed through two of the next reversioners who executed the deeds of ratification must be held bound by the consent of their fathers. The fact that the fathers in that case gave their assent for consideration to alienations already effected while in the present case the fathers gave their consent for consideration to future alienations does not appear to make any difference so far as the present point is concerned.

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1. (1897) I. L. R. 21 M. 128.

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I am, therefore, of opinion for this reason that the question referred to us must be answered in the negative.

Sankaran Nair J.:—[After citing the Order of Reference] proceeded as follows:—

Their Lordships of the Privy Council observe in *Collector of Masulipatam* v. *Cavaly Vencata Narrainappa*[1]: "For religious or charitable proposes or those which are supposed to conduce to the spiritual welfare of her husband she has a larger power of disposition than that which she possesses for purely worldly purposes. To support an alienation for the last, she must show necessity. On the other hand it may be taken as established that an alienation by her which would not otherwise be legitimate, may become so if made with the consent of her husband's kindred."

Thus a widow may dispose of her inheritance for necessity. The consent of the reversioners may be evidence in such cases of the necessity of the alienation. But the alienation itself does not derive its validity from such consent. Except as evidence the consent of the kindred is immaterial. Where the alienation is for a religious or charitable purpose, the alienee might rely upon the consent of the kindred to show that the alienation was fair and justified by Hindu law.

On the other hand, "an alienation which would *not otherwise be legitimate* may become so, if made with the consent of the husband's kindred." Or in other words, an alienation not for necessity or for religious or charitable purposes may be valid in certain cases if made with the consent of the husband's kindred. The consent by itself makes the alienation not otherwise legitimate valid. Is it sufficient then to secure the assent of the presumptive reversioner? The validity of an alienation by a widow with the consent of the next reversioner was considered by the Calcutta High Court in *Nobo Kishore Sarma Roy* v. *Hari Nath Sarma Roy*.[2]

The learned *Chief Justice* was of opinion that as a widow might, if she had so pleased, disclaim her estate when her husband died, there would seem nothing wrong or objectionable in her relinquishing her estate at any time in favour of her husband's heirs after she had once accepted it. He also pointed out that if

1. (1860) 8 M. I. A. 529 at p. 561.

2. (1884) I. L. R., 10 C. 1102.

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she died a natural death or if she were to become a byragi or otherwise die a civil death then they would succeed. And he further held : "If it is once established as a matter of law that a widow may relinquish her estate in favour of her husband's heir for the time being, it seems impossible to prevent any alienation which the widow and the next heir may agree to make," though it not unfrequently happened, according to the *Chief Justice*, that the widow arranged with the next heir of her husband for the time being, to alienate the estate to some third person for their mutual benefit. In the same case *Mitter* J. observed: "If the widow is competent to relinquish her estate to the next male heir of her husband, it follows, as a logical consequence, that she can alienate it merely with his consent without any legal necessity."

In the case in *Behari Lal* v. *Madho Lal Ahir Gayawal*[1] the Judicial Committee considered that "it may be accepted that according to Hindu Law, the widow can accelerate the estate of the heir by conveying absolutely and destroying her life estate." They added, however, "it was essentially necessary to withdraw her own life estate, so that the whole estate should get vested at once in the grantee."

This decision was by this Court considered to have settled that a widow may effect a valid surrender of her entire estate to the next presumptive reversioner, *Subrahmanya Aiyar*, J. observing that, though there has been no course of decisions on the point in this Presidency as in Bengal, there is nothing in the doctrine itself to make it less suited to the community in Madras and that the Calcutta rulings have been in practice followed.

The Judges of the Allahabad High Court are of opinion that the rights of all the reversioners are upon the same legal footing *inter se* and no distinction can therefore be drawn between the rights of the nearer and more remote reversioners, and the decisions of the Calcutta High Court that a grant by a Hindu widow with the concurrence of the next reversioner creates a title which cannot be impeached on the death of the widow by the actual reversioner is opposed to the Hindu law and the decisions of the Privy Council—see *Ramphal Rai* v. *Tula Kuari*.[2] In the case of *Bajrangi Singh* v. *Manokarnika Baksh Singh*[3] their Lordships of the

1. (1891) I. L. R. 19 C. 236 at p 241. 2. (1883) I. L. R. 6 A. 116.
3. (1907) 12 C. W. N. 74.

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Privy Council, after referring to and apparently approving the opinions of *Garth* C. J., *Mitter* J. and *Subrahmanya Aiyar* J., and referring also to a decision in *Vinayak* v. *Govind*[1] and *Ramphal Rai* v. *Tala Kuari*,[2] observe: "The High Court of Allahabad indeed does not recognise the validity of the surrenders in favour of alienations with the consent of presumptive reversioners so as to defeat the title of the actual reversioner at the time of the widow's death. But this restriction is at variance with the principle itself and is not in accordance with the practice in other parts of India in which the Mitakshara law prevails."

It must now be taken, therefore, to be settled law that surrender by a widow in favour of presumptive reversioners of her whole life estate and alienations with their consent are valid. Their Lordships also decide that when a number of persons constitute the next reversion, the consent of all of them must ordinarily be obtained.

This was scarcely disputed before us, but it was argued that the widow cannot make a partial alienation and that the alienation in question is therefore invalid. With reference to the validity of an alienation of a portion of the widow's estate, there is a conflict of opinion in Calcutta. Such an alienation was held to be invalid in *Radha Shyam Sircar* v. *Joy Ram Senapati*,[3] while in a later case in *Hem Chunder Sanyal* v. *Sarnamoyi Debi*[4] it was decided that a widow may alienate with the consent of the next reversioner the whole or any portion of the estate. This Court, differing from the later Calcutta decision, held that the widow must surrender or alienate the whole inheritance—*Marudamuthu Nadan* v. *Srinivasa Pillai*.[5] Looking to the reason of the rule, this appears to me to be the sounder view. The consent of the next presumptive reversioner is effective to validate an alienation by the widow, because, if the widow relinquishes her estate to him, it would be open to him to transfer the estate to the alienee. And as the question is, therefore, one of conveyance only, there is no reason why a transfer by the widow herself to the alienee with such reversioner's consent should not be held valid instead of driving the parties to adopt a circuitous method.

1. (1900) I. L. R. 25 B. 129.
2. (1883) I. L. R. 6 A. 116.
3. (1890) I. L. R. 17 C. 896
4. (1894) I. L. R. 22 C. 355.
5. (1897) I. L. R. 21 M. 128.

But for this purpose it is necessary the widow's estate must be entirely extinguished as a reversioner cannot succeed to a portion of the husband's estate only. Where the facts do not raise that presumption of extinguishment the rule does not apply. I do not think the Privy Council intended to decide otherwise in *Bajranigi Singh* v. *Manokarnika Bakhsh Singh*.[1] They cite apparently with approval the decision in *Marudamuthu* v. *Srinivasa Pillai*[2] and they do not refer to their own earlier decision in *Behari Lal* v. *Madho Lal Ahir Gayawal*[3] in which they held "it was essentially necessary to withdraw her own life estate so that the whole estate should get vested at once in the grantee." Though in the case in *Bajrangi Singh* v. *Manokarnika Baksh Singh*[1] the alienations were of portions of the estate, the consent was only given after all the alienations, and the validity was rested not only on the consent of the immediate reversioner but also on other grounds to be presently referred to. But in the case before us an arrangement appears to have been come to in 1850 between the two widows and the whole body of persons constituting the next reversion, the effect of which was that the reversioners should obtain a portion of the estate while the widows should take the rest absolutely. I think Exhibit *IV* must be treated as having the same effect as a transfer by the widow to the reversioners of her entire estate and a second transfer by the reversioners of a portion of the property so conveyed to the widows. It is not, therefore, an alienation of a portion of the widow's estate, leaving the rest in the possession of the widow to be inherited by the actual reversioner at the time of the widow's death. There was, on the other hand, an entire destruction of the widow's estate. The property taken by the reversioners was to be enjoyed by them as if they had inherited it on the widow's death. What passed by the agreement to the widows was to be enjoyed by them not as widows' estate, subject to all its restrictions, but as their own absolutely with power to alienate or devise. The widow's estate was completely extinguished, nor do I see anything unreasonable or opposed to any rule of Hindu law in this arrangement. The reason for restraining a widow from absolutely disposing of the estate is that the estate should be kept in the family from which

1. (1907) 12 C. W. N. 74. 2. (1897) I. L. R. 21 M. 128.
3. (1891) I. L. R. 19 C. 236.

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it came to her. And if they are willing to accept in lieu of what would ultimately come to them, another estate *in presenti* which with its profits might in the case of a young widow equal or exceed in value at the time of her death, the property they might then get—for it must be remembered that she has absolute power over the income and a discretion to alienate the property for certain purposes—there seems to be nothing in principle to prevent them from doing so. When the principle is admitted it is not for the Courts to determine whether the reversioners acted wisely or not in consenting to any particular transaction; and if the result of such a transaction is to give a woman the absolute estate as opposed to a widow's estate, I see no reason for setting it aside. Further, it must be remembered that the rule is applicable not only to a widow, but to other females who inherit property from males. Yet those female heirs of a different Gotra, or who upon their marriage become of a different Gotra from the last male owner as a daughter, sister, or niece, take absolutely in the Bombay Presidency. In this Presidency also property inherited by a maiden daughter is her absolute estate. It is, therefore, difficult to say that it is against Hindu law to allow a woman inheriting property from a male to possess anything other than what is called a woman's estate therein. In *Nobo Kishore Sarma Roy* v. *Hari Nath Sarma Roy*[1] the learned Chief Justice in recognising their validity referred to the practice of alienations by the widows in collusion with the next reversioners for their mutual benefit and as pointed out by Mr. Justice *Shepard* in *Marudamuthu Nadan* v. *Srinivasa Pillai*.[2]

The Privy Council had probably this case *Behari Lal* v. *Madho Lal Ahir Gayawal*,[3] in view in upholding the surrender of a widow's estate. Any other conclusion would only compel the widow to enter into collusive transactions with the next reversioner for their mutual benefit. For this reason, I am of opinion that the alienations made by the widows are valid in the case before us, and the plaintiffs cannot maintain the suit. If the alienation cannot be supported on this ground the consent of the kindred will justify it only "if there should be such a concurrence of the members of the family as suffices to raise a presumption that the

1. (1884) I. L. R. 10 C. 1102. 2. (1897) I. L. R., 21 M. 128.
3. (1891) I. L. R. 19 C. 236.

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transaction was a fair one and one justified by Hindu law"—*Raj Lukhee Dabea* v. *Gokool Chunder Chowdhry.*[1] "In order to raise such a presumption the consent of the deceased's kindred to his widow's or daughter's alienation must be shown to be given with a knowledge of the effect of what they were doing and an intelligent intention to consent to such effect"—*Sham Sunder Lal* v. *Achhan Kunwar.*[2] The Bombay High Court uphold the validity of the widow's alienations on this ground. They were not inclined to accept the theory of the extinction of the widow's interest, possibly for the reason that in Bombay the doctrine that the estate of a woman succeeding to a male is only an interposition between the estates of two males is not accepted in its entirety as in Bengal and Madras. In considering the nature of the consent necessary to validate an adoption by a widow to her deceased husband, the Privy Council observed in *Bajrangi Singh* v. *Manokarnika Baksh Singh*[3] "that ordinarily the consent of the whole body of persons constituting the next reversion should be obtained, though there may be cases in which special circumstances may render the strict enforcement of this rule impossible." This is more fully explained by *Bhashyam Aiyangar* J. who observed : "The presumptive reversionary heir or heirs are the nearest of kin to the deceased husband and as such the natural advisers of the widow, and if his or their assent be obtained and the same be given *bona fide* and not from any corrupt motive, that would be sufficient authority on which she could act, and it would not be necessary that she should seek the assent of remoter reversionary heirs. The two cases reported in *Parasara Bhattar* v. *Ranga Raju Bhattar*[4] and *Venkatakrishnamma* v. *Annapurnamma*,[5] proceed on this view though it does not appear from the report whether or not there were remoter reversionary heirs in existence. If the presumptive reversionary heir or heirs withhold his or their assent from improper motives, the widow may validly act upon the assent given *bona fide* by remoter reversionary heirs."—*Subramanyam* v. *Venkamma.*[6] I think this is the correct view. If, therefore, such consent is efficacious for the purpose of adoption which would entirely defeat the claim, there is no reason why it should not be held to be valid to validate

1. (1867) 13 M. I. A. 209 at p. 228.
2. (1898) I. L. R. 21 A. 71 at p. 80.
3. (1907) 12 C. W. N. 74.
4. (1880) I. L. R. 2 M. 202.
5. (1900) I. L. R. 23. M. 416.
6. (1903) I. L. R. 26 M. 635.

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alienations as well. In the case of *Vinayak* v. *Govind*[1] the consent of the immediate reversioner was not obtained, but the transaction there was of a nature that her assent could not be regarded as raising any presumption that the alienation was a justifiable one, and therefore the assent of the next and the only other reversioner was considered sufficient. In the case before us, the presumptive reversioners have consented. But there has been no assent to the particular alienations under which the defendants claim which were made by the widows only years after. Judged by the test in *Sham Shundar Lal* v. *Achhan Kunwar*,[2] the assent is not, therefore, sufficient to validate the alienations.

There is also another ground on which the widow's alienations are supported when made with the reversioners' consent. In the case before the Privy Council the actual reversioners at the time of the widow's death were the descendants of those who gave their consent for consideration to the alienations impeached, and their Lordships held that "the appellants who claim through Matadin Singh and Bajnath Singh must be held bound by the consent of their fathers." As observed by their Lordships in *Bahadur Singh* v. *Mohar Singh*[3] those who gave their consent were but expectant heirs with a *spes successionis*. The actual reversioner who contested the alienation claimed in his own right as the heir of the last male owner and he was not bound by a contract made by every person through whom he traced his descent. The contract referred to by their Lordships is not one of which the actual reversioner or his family had the benefit. If he or his family enjoyed the benefit, he could not repudiate the transaction. In *Nobo Kishore Sarma Roy* v. *Hari Nath Sarma Roy*,[4] the learned *Chief Justice* stated that the consent of the reversioner "would, of course, bind the person so consenting to it and all persons so claiming under him." It is not clear whether the consent was given for consideration, but that was probably the case. In *Subrahmanyam* v. *Venkamma*,[5] *Bhashyam Aiyangar* J. observed with reference to the reversioner's assent to an adoption by a widow that "in an undivided family, no doubt, the senior in age having the status of managing member of the family, it may be that his assent alone, if

1. (1900) I. L. R. 25 B. 129.
2. (1898) I. L. R. 21 A. 71 at 80.
3. (1901) I. L. R. 24 A. 1?7.
4. (1884) I. L. R. 10 C. 1109.
5. (1903) I. L. R. 26 M. 634.

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given *bona fide*, will be sufficient and equivalent to the assent of the family." The question was fully discussed by Mr. Justice *Ranade* in *Vinayak* v. *Govind*,[1] and he took the view that the reversioner was bound by his father's assent if given for consideration. If the actual claimant has enjoyed the benefit of the possession by his family of the property which was given to his father by the widow as the price of his assent to the alienation by her, I fail to see how he can participate in that benefit and at the same time impeach the transaction. Where there was an agreement without any consideration, the actual reversioner may not be bound as held in *Bahadur Singh* v. *Mohar Singh*.[2] Mr. Seshagiri Aiyar indeed broadly contended, in a case raising the same question which was argued after this case, that so far as Madras is concerned, it must now be taken that the immediate reversioner represents the others—*Chiruvolu Punnamma* v. *Chiruvolu Perrazu*[3]—but, however that may be, I entertain no doubt that the father represents the family in a transaction which he entered into for the benefit of the family, and that that transaction cannot be impeached by any member of the family when the members had the benefit of the transaction. In the case before us the plaintiff's father had received a portion of the property as a considertion—see Ex. *IV*.

For the reasons above given, I am of opinion that the suit cannot be maintained. I would, therefore, answer the question referred to us in the negative.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and M. Justice Boddam.

The King Emperor .. Appellant.*

v.

Kanna .. Accused.

King Emperor v. Kanna.

Madras Acts—Town Nuisances Act, S. 3 (6)—Exposing fish for sale—Obstruction.

Where the evidence established conclusively that owing to the accused's selling fish on the roadside near the market numbers of people collected there and caused an obstruction *Held*, that the accused committed an offence under S. 3 (6) of the Town Nuisances Act.

Appeal under S. 417 of the Code of Criminal Procedure from the judgment of acquittal in C. C. No. 489 of 1900 by the Stationary Sub-Magistrate of Kasergode.

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* Cr A. No. 169 of 1908. 7th April 1908

1. (1900) I.L.R 25 B. 141.
2. (1901) I. L. R. 24 A. 107.
3. (1905) I. L. R. 29 M. 390 at p. 401

King Emperor v. Kanna.

The Public Prosecutor for the Crown.

The Court delivered the following

JUDGMENT :—The order of the Stationary 2nd Class Magistrate acquitting the accused cannot be supported. The accused was charged with exposing fish for sale so as to cause obstruction under S. 3 (6) of the Town Nuisances Act.

The Magistrate has acquitted him, because the obstruction was caused by people collecting in front of him for the purpose of buying his fish and was not caused by the fish that were being exposed. The evidence which was uncontradicted proved conclusively that owing to the accused's selling fish on the road side near the market, numbers of people collected there and caused an obstruction. This is clearly an offence within the section and the accused should have been convicted.

The case referred to—*Venkatarama Chetty* v. *Emperor* [1]—has no application. The order of acquittal of the Stationary 2nd Class Magistrate is set aside, and we direct the Magistrate to retake the case on his file and dispose of it according to law.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis.

Rangasawmi Chetty and 2 others .. (*1st to third Accused*)

v. *Petitioners.**

Emperor.

Waiver—Criminal trial—Waiver of provisions regulating the trial—Illegality—Accused cannot waive.

Rangasawmi v. Emperor.

An accused person cannot in a criminal trial waive the benefit of the legal provisions regulating the trial. A misjoinder of charges vitiates the trial and no waiver of the irregularity by the accused can cure it.

T. Rangaramanjachariar for petitioner.

The Public Prosecutor (*E. B. Powell*) for the Crown.

The Court delivered following

JUDGMENT:—An accused person cannot in a criminal trial waive the benefit of the legal provisions regulating the trial. There has clearly been a misjoinder of charges, the conviction must be set aside, and the fines if levied, must be refunded.

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1. (1904) I. L. R. 28 M. 17.

* C. R. C. No. 512 of 1907. 28th February 1908

C. R. P. No. 371 of 1907.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Miller.

Mary Harriett Annie Wilson .. Appellant* (*Plaintiff*).
v.
George Oakes and another .. Respondents (*Defendants*).

Annie Wilson v. George Oakes.

Will—Construction—Principles—Life estate—"In trust"—"As she may require"—"For her maintenance and support."

In construing a will, technical words of known legal import must be given their legal effect even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense. [*Lalit Mohan Roy* v. *Chukkum Lal Roy*[1] referred to.]

Where there has been a devise or bequest of all a man's property, the generality of the disposition should not be cut down unless the intention that it should be so cut down is clear.

Ambiguous words in a will should generally be construed against the tenant for life.

A Will contained the following clauses.—

Cl 1. I wil and bequeath to my dear wife . . . *in trust* and for her maintenance and support during her life all the money, *property*, goods and chattels of which I may die possessed whatever and wheresoever situated and I appoint my dear wife Anne sole administratrix of this my last will and testament.

Cl. 10. I further will that my dear wife Anne as sole executrix of this my last will and testament shall draw from current deposit accounts whether here or in Great Britain such sum or sums of money *as she may require* for her maintenance and for the working and maintenance of my property, and that she shall receive and dispose of all processes, rents and profits from the said property as to her may seem best in the interests of the property and I empower her to sell all or any part of the property at any time when it may appear to her that a favourable opportunity occurs.

Held on the construction of the will that the testator intended to give a life estate to his wife and that he did not intend to create a trust in the legal sense and that, if he did, he intended the trust to be for the benefit of his wife and of his wife only.

The words "for her maintenance and support" in Cl. 1 are words of description or motive and in no way cut down the life estate given to the wife. The phrase "as she may require" in Cl. 10 means "as may be necessary" and not "as she may think fit."

Appeal from the interim decree of the Subordinate Judge's Court of the Nilgiris in O. S. No. 84 of 1904.

The Advocate General (P. S. Sivaswami Aiyar), V. Krishnaswami Aiyar and *E.F. Greatorex* for appellant.

C.F. Napier for respondents.

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* A. No. 1 of 1907. 23rd March, 1908.

1. (1897) I. L. R. 24 C. 834. (P. C.)

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The question in the case was one of construction of a will. The will in question contained the following clauses :—

"Cl. 1 :—I will and bequeath to my dear wife Anne in trust and for her maintenance and support during her life all the money, property, goods and chattels of which I may die possessed whatsoever and wheresoever situated and I appoint my dear wife Anne sole administratrix of this my last will and testament."

Cl. 10 :—I further will that my dear wife Anne as sole executrix of this my last will and testament shall draw from current deposit accounts whether here or in Great Britain such sum or sums of money as she may require for her maintenance and for the working and maintenance of my property and that she shall receive and dispose of all processes, rents and profits from the said property as to her may seem best in the interests of the property and I empower her to sell all or any part of the property at any time when it may appear to her that a favourable opportunity occurs."

The further facts of the case appear from the judgments.

The Advocate General :— There are three possible views as to the construction of the will which would sustain the plaintiff's claim in full: (i) That there is a valid trust for the benefit of the remaindermen in respect of the surplus income after deducting what is reasonably necessary for the maintenance of Mrs. McIvor (the testator's wife). (ii) That though a trust was intended, the objects being uncertain, the trust is invalid. (iii) That no trust was intended, but that Anne McIvor was to take a life estate with a duty to spend the surplus income on the estate. If the first or the third view is the correct one, the plaintiff is entitled to recover as administratix for the benefit of the remaindermen ; if the second view should prevail, she would be entitled to recover on behalf of the next of kin in whose favour a trust will result. There is a difference between precatory trusts and express trusts. Uncertainty of object or discretion in the trustee negatives a trust in the former case, the purpose of the gift being regarded as the motive for the gift—*Thorp* v. *Owen*[1]; Theobald p. 473; Jarman (5th ed.) p. 366. But where the trust is clear, such uncertainty only invalidates the trust. A trust in favour of the next of kin results—Godefroi on Trusts,

1. (1843) 2 Hare 687 (s.c.) 6 7 E. R. 250.

3rd ed., p. 189. This is so even in the case of precatory trusts if a trust is clearly intended—*Briggs* v. *Penny*[1]; Lewin on Trusts, p. 143. The words "in trust," "upon trust," raise a trust—*In re Williams*[2]; *In re Sanderson's Trusts*[3]; Jarman on Wills, p. 354 (5th ed.). Terms of art are used by a testator at his peril. The doctrine of precatory trusts ought not to be extended—*The Mussoorie Bank* v. *Albert Charles Raynor*.[4] Provision for "maintenance" is not uncertain. It can be assessed by Court—*Thorp* v. *Owen*[5]; Jarman pp. 328 and 336. There cannot be a trust for oneself—Lewin p. 11; Indian Trusts Act, S. 3—but only for oneself and others, or for others; *Taylor* v. *Bacon*[6]; *Jubber* v. *Jubber*.[7] No part of a will is to be rejected as destitute of meaning—Ss. 69 and 72, Succession Act. The discretion indicated in "as to her may seem best" is only as to the mode of application of the trust funds—Lewin, p. 369 If the trust fails, or if it does not exhaust the fund, a trust results in favour of the testator—*Briggs* v. *Penny*[1]; *Mapp* v. *Elcock*[8]; S. 83, Trusts Act; Jarman, p. 354. This principle has been applied to illegal trusts in S. 56, Trusts Act—*Adnam* v. *Cole*[9] and to bequests to an executor.

Questions of law may be raised in appeal for the first time when they arise on construction of documents or upon the facts proved or admitted — *Connecticut Fire Insurance Company* v. *Kavanagh*[10]; *Ahmad Wali Khan* v. *Shamsh-ul-Jaharu Begam*[11] "In the interests of property" = "in the interests of persons entitled to property" — *Lockhart* v. *Hardy*[12]; *In re Skinner's Trusts*[13]; *In re Bowes*.[14]

V. Krishnasami Aiyar:—On the footing that the testators's wife was a life tenant—she was a life tenant by force of the 1st clause—a duty was imposed upon her by the 10th clause. She was liable for non-performance of this duty to the remaindermen as upon a contract—*Blackmore* v. *White*[15]; *In re Skingley*[16]. She

1. (1851) 3 DeG. and Sm. 525; 42 E. R 371.
2. (1897) 2 Ch. 12.
3. (1857) 3 K and J 497 ; 69E. R: 1206.
4. (1882) 4 A. 500 ; 7 Ap. Cas. 331.
5. (1843) 2 Hare 607 ; 67 E R. 250.
6. (1836) 8 Sim. 100 : 59 E. R. 40.
7. (1839) 9 Sim. 503 ; 59 E. R. 152.
8. (1849) 2 Phillips 793; 41 E.R. 1150.
9. (1848) 6 Bea. 353 ; 49 E. R. 862.
10. (1892) A. C. 473.
11. (1906) 28 A. 482.
12. (1846) 9 Beav. 379 ; 50 E. R. 389.
13. (1860) 70 E. R. 679.
14. (1896) 1 Ch. 507.
15. (1899) 1 Q. B. 293.
16. (1851) 42 E. R. 246.

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was at least liable for permissive waste. The burden of proving absence of negligence is under the circumstances on the defendant.

C. V. Napier:—Legal words must be given their full legal import—*Lalit Mohun* v. *Chukkum Lal Roy*[1]; *Roddy* v. *Fitzgerald.*[2] Result is, merger of the trust and the life estate for the donee free of trust—Lewin on Trusts p. 12; *Mapp* v. *Elcock.*[3] The words "in trust," though highly technical, have been disregarded when the context requires it—*Quayle* v. *Davidson.*[4] The Court strains the language against the executor—*Mapp* v. *Elcock*[5]—not against the wife. All the cases make a distinction between gifts of a fund for maintenance and provision for maintenance out of a fund. Here, maintenance is only the motive for the gift. The trust, if any, is uncertain, and therefore void on the principle of *George* v. *Grose*[6]; *Rodgers* v. *Rodgers.*[7] The gift becomes absolute in favour of Anne McIvor. Provision for maintenance to wife is unknown to Englishmen. *In re Jones*[8], *In re Andrew's Trusts*[9], *Attwood* v. *Alford*[10], *Webb* v. *Kelly*[11], *In re Sanderson's Trusts*[12], are authorities for regarding maintenance as only motive. In *Williams* v. *Williams*[13] gift over with gift of the income in the interval has been regarded as absolute gift. It points out the distinction between gift of interest for maintenance and provision for maintenance out of interest. *Briggs* v. *Penny* [14]has never been followed. *Stead* v. *Mellor* is.[15] "In the interests of property" would include "in her own interest absolutely and exclusively." She, therefore, takes the savings. *In re Bowes*[16] is distinguishable. The remaindermen got it because the testator's wish became impracticable otherwise, and not because of the words "in the interests of the property." In *In re Skinner's Trusts*,[17] the person to be benefitted was expressly mentioned. "As to her may seem best" destroys any certainty there might be otherwise. The word "shall"

1. (1897) I. L. R. 24 C. 834. (P C)
2. (1858) 6 H. L. C. 823.
3. (1849) 2 Phillips 793; 41 E.R. 1150.
4. (1858) 12 M P. C. 268.
5. (1849) 2 Phillips 793; 41 E R. 1150.
6. (1900) 1 Ch. 84.
7. (1875) 31 L. T. 285
8. 67 L J. Ch. 211.
9. (1905) 2 Ch. 48.
10. (1866) L. R. 2 Eq. 479.
11. (1839) 47 R. R. 288.
12. (1859) 3 K and J. 497; 69 E. R. 1206
13. (1907) 1 Ch. 180.
14. (1851) 3 DeG and Sm. 525; 42 E. R. 871.
15. (1877) 5 Ch. D. 225.
16. (1896) 1 Ch. 507.
17. (1860) 70 E. R. 679.

in the first part only enables her to do what she would not otherwise be entitled to do; so also the next part—*Lambe* v. *Edmes*.[1] The obligation to maintain in proper condition is analogous to the obligation to repair. The person entitled to sue would be the remainderman and in tort. It cannot be the subject of an administration action. It may be open to the defence of limitation. Annie Wilson v. George Oakes

The Advocate-General.—The practical effect of the argument of the respondent is to render the words "in trust" nugatory. In the case in *Quayle* v. *Davidson*[2] the non-existence of the son was the circumstance which weighed with their Lordships. If the son did exist, their Lordships would have held otherwise.

The Court delivered the following

JUDGMENTS.—*The Chief Justice*:—In this case the plaintiff sues as administratrix of the estate of one William Graham McIvor. The defendants are the executors of the will of Anne McIvor, his wife. William McIvor made a will on May 24, 1876, and died on June 8, 1876. Anne McIvor took out probate of this will on August 3, 1876, and took possession of the testator's estate and remained in possession until her death. Anne McIvor made her will on March 27th, 1900, and died on November 23, 1903. The plaintiff, as representing the estate of Wiliam Graham McIvor, claims relief against the defendants, as representing the estate of Anne McIvor. The hearing of the suit before the Subordinate Judge of the Nilgiris was very protracted, and a great number of questions of law and fact were raised before him and disposed of by him.

The learned Judge held, amongst other things, that, under the will, Mrs. McIvor took an ordinary life estate, and that the will did not operate so as to create a trust for the benefit of the residuary legatees. He also held that the defendants were not liable for waste in respect of a portion of the property known as the Hulikal coffee estate. The appeal is against the decree of the Subordinate Judge with reference to these questions. There is also a cross-appeal by the respondents. The question raised by the cross-appeal mainly turns on the construction of a particular clause in the will.

In construing the will in question the test we have to apply is: What did the testator mean having regard to the words he used?

1. (1871) L. R. 6 Ch. Ap 597. 2. (1858) 12 M. P. C. 268.

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and in applying this test we must give effect to the principle that "technical words of known legal import must have their legal effect even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense"—*per* Lord *Davey* in *Lalit Mohun Roy* v. *Chukkum Lal Roy.*[1]

Applying these tests, I am of opinion that the will did not create a trust in favour of the residuary legatees and that Mrs. McIvor took an ordinary life estate.

It is clear that there would be no ground for the appellant's argument that the will operated so as to create a trust were it not for the words "in trust" which occur in paragraph 1.

The argument was that these words occurring in paragraph 1 should be imported into paragraph 10 and that their effect was to constitute Mrs. McIvor a trustee of the property for the purposes mentioned in paragraph 10 of the will for the benefit of the parties entitled under the residuary devise and bequest; or if the trust, though validly created, was not legally enforceable for the benefit, by way of a resulting trust, of the next of kin of the testator. (See S. 83 of the Indian Trusts Act.)

The way in which the appellant sought to establish the trust was, as I have said, to import the words "in trust" into paragraph 10 and then to read the words "that she shall receive and dispose of all proceeds, rents and profits from the said property as to her may seem best in the interests of the property" as defining the purpose of the trust.

The testator did not in terms appoint his wife a trustee. He refers to her in the will apparently indiscriminately as administratrix and executrix. In paragraph 1 he wills and bequeaths, in the most general language which he could adopt, all his property to his wife "in trust and for her maintenance and support during her life," and, after making this disposition he appoints her his sole administratrix. The will was obviously drawn by the testator himself, or at any rate by a layman, and, in my opinion, in using the words "in trust" the only object which the testator had in view was the nature of the estate which he intended

1. (1897) I.L.R. 24 C. 834 at p. 846. (P. C.)

his wife to take, and that he considered the words appropriate as indicating that she should enjoy the income of the property for life, but that she should not be entitled to deal with the *corpus* except as specially directed and empowered by the will.

I think I should be warranted in holding that, reading the will as a whole, it was clear the testator did not intend to use words "in trust" in their technical sense, but it is not necessary for me to go as far as this. I am prepared to give their legal effect to the words "in trust," and I think their legal effect is to give both the legal and the equitable estate to Mrs. McIvor, that the two estates merge and Mrs. McIvor takes the legal estate. The cases in which the Courts have held that a trustee does not take beneficially have no application to a case of this sort, where, as it seems to me, if the testator intended to create a trust at all, the trust was in terms in favour of the party in whom the legal estate was vested. The question whether the will operated so as to create a trust cannot be considered apart from the question whether Mrs. McIvor took under the will a life estate, or something less than a life estate, because if, on the true construction of paragraph 1, the only interest she took is a right to be maintained and supported during her life, this would go a long way to support the view that the testator intended the property to vest for the benefit of the residuary legatees.

As regards paragraph 1, I am of opinion that the words "for her maintenance and support" are words of description or motive, and in no way cut down the estate "during her life" which the testator in terms gave to his wife. I do not propose to discuss the authorities which were cited on the one side and the other with reference to this question; but I think I am right in saying that in no case has it been held that where there has been a devise or bequest of *all* a man's property the generality of the disposition has been held to be cut down unless the intention that it should be so cut down is clear. In this particular case we cannot overlook the fact that the party to whom the bequest was made was not a stranger but the testator's wife for whom, as the will abundantly shows, he was desirous of making generous provision.

I now turn to paragraph 10. The first observation which occurs to me is that notwithstanding that the wife is referred to "as sole

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executrix," it is an enabling paragraph. The first clause enables her to do what as tenant for life she could not do, *viz.*, spend a portion of the *corpus* on her own maintenance and the working and maintenance of the property. The last clause gives a power of sale in the widest possible terms. The intermediate clause, according to the appellant's contention, so far from having any enabling effect, or being in any way for Mrs. McIvor's benefit, imposes on her the obligation of spending on the property every rupee which was not required for her own maintenance, wholly regardless of whether or not such expenditure was prudent or desirable. Now it seems to me clear that what the testator intended by this clause was to make it clear that Mrs. McIvor's discretion with regard to the maintenance and development of the property should be unfettered, and should not be questioned by any party who might be interested in the reversion. I cannot read the clause as if the words "as to her may seem best" were eliminated, and I read the clause as meaning that the income of the property which she spends upon the property should be applied as she thinks fit. The construction which the apellant asks us to put upon the words in paragraph 10 which he relies on as defining the purpose of the trust, involves giving a different meaning to the word "shall" (shall receive and dispose, &c.) from that which it obviously bears in the first clause of the paragraph (shall draw from *viz.* shall be entitled to) and it is quite inconsistent with the general tenor of the paragraph and with the express power of sale given by the last clause of the paragraph. This power of sale would have enabled Mrs. McIvor if she were so minded to sell every acre of the property and invest the proceeds, and if this had been done, there would have been no "property" (in the sense in which the word is used in paragraph 10) and no income from the property. Further the effect of this construction would be practically to destroy the life estate which, in my view, Mrs. McIvor took under paragraph 1 of the will.

The view that the testator intended that Mrs. McIvor, while being given the widest discretion and the amplest power—extending to the sale of the whole property if she thought it desirable—in connection with the management of the property, should take in return a sum sufficient to maintain her, unaffected by any increase in the value of the property, seems to me wholly unreasonable. Such a disposition of property in the case of a steward or

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a bailiff would be ungenerous and unbusinesslike. In the case of a testator's wife it seems to me to be almost inconceivable. Of course, if the words of the will made it clear that this was the intention of the testator, it would be our duty to give effect to this, but construing the will quite independently of any *a priori* ideas as to what the testator might or might not have intended, I think the language of the will, read as a whole, makes it clear that the testator intended to give a life estate to his wife, that he did not intend to create a trust in the legal sense, and that, if he did, he intended the trust to be for the benefit of his wife and of his wife only.

I do not propose to discuss the authorities which were so fully considered by the Subordinate Judge. As I have observed before, in a case of this sort authorities are of little use except in so far as they lay down broad canons of construction.

As regards the construction of the will, I agree with the conclusions arrived at by the Subordinate Judge in his able and exhaustive judgment.

Besides the question of the construction of the will a subsidiary question was argued before us on appeal. It was contended that Mrs. McIvor had been negligent in the management of a portion of the property known as the Hulikal coffee estate and that her estate was liable to the plaintiff as representing the estate of the testator for "permissive waste." The Subordinate Judge's view of the law was (see paragraph 111 of his judgment) that the 1st clause of paragraph 10 of the will expressly enjoined on Mrs. McIvor the duty of repairing and maintaining the property in which she had the life estate and that she was liable for "permissive waste." I do not pause to consider whether the Judge was right or wrong in his view as to the legal effect of this portion of the will. I assume he was right. A large body of evidence was given with reference to this question, and the evidence was fully considered by the learned Judge in paragraphs 112-133 of his judgment. His finding of fact was that though the Hulikal estate deteriorated considerably during the life tenancy of Mrs. McIvor, the deterioration was not due to negligence on her part. I see no reason to differ from this finding of fact.

The question raised by the respondent's cross-appeal turns upon the construction of the words "as she may require" in

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paragraph 10 of the will. The words occur in the direction given by the testator empowering Mrs. McIvor to draw upon "current deposit accounts" for her maintenance and for the working and maintenance of the property. The respondents contended that the words meant "as she may think fit." The appellant contended they meant "as may be necessary." The Subordinate Judge accepted the latter construction, and I think he was right. In the same paragraph when the testator wanted to give an absolute discretion to his wife he used the words "as to her may seem best." Further the authority given to the wife was an authority to do something beyond the ordinary powers of a tenant for life and I think the words, if ambiguous, as they undoubtedly are, should be construed against the tenant for life. There was no doubt considerable force in Mr. Napier's contention that the will made no provision for the wife in the shape of a legacy to meet immediate expenses and that the testator's object was to secure his widow against temporary financial inconvenience by reason of his death. But what I think the testator had in his mind was that at some future time the return from the property might be insufficient to provide adequately for the widow and for the upkeep of the property, and that it was for this contingency that he wished to make provision. Accepting this construction, it was for the defendants to show that when Mrs. McIvor drew on the current accounts, she was under the necessity of doing so. The evidence furnished by the accounts is quite inconclusive. Mr. Napier's contention, if I understood his argument aright, was that the widow was entitled to draw on the current accounts until money began to come in from the property and that she was not to be held accountable for any drawings on the current accounts made when the estate account, so to speak, was not in funds. I think, however, the evidence furnished by the accounts is too vague to enable us to say there was any necessity for Mrs. McIvor to draw on the current accounts at the time the drawings in question were made. I would dismiss the appeal with costs.

I would also dismiss the cross-appeal with costs.

Miller J.:—I have had the advantage of reading the judgment which the learned Chief Justice has just delivered and I agree with all that he has said. It seems clear to me that in paragraph 10 of the will the testator was conferring on his wife certain

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powers which in his view would not belong to her as tenant for life and the exercise of which might, if they were not expressly conferred upon her by him, be questioned by those who would take the property after her death. The words 'as sole executrix' may perhaps have reference to this view. She was to have certain powers of administration in respect of the *corpus* of the estate. She was empowered to draw on part of it in case of need; she was to have uncontrolled power to deal with the income in what she might consider the most profitable way, the testator no doubt reasonably assuming that till a favourable opportunity for conversion should occur she would endeavour to maintain the property in as prosperous a condition as might be possible ; and she was empowered at a favourable opportunity to convert the whole into cash.

It is impossible I think to read the second clause of this paragraph as a direction to expend all the income on the property. To do so we have to read the word "all" as meaning " all except what is required for other purposes for which provision is made in this will;" we have to give to the word "shall" a different meaning in each of two consecutive clauses of the same paragraph in both of which it stands in the same position, and we have to hold that the testator inserted one of the most important clauses in the will, a clause by which the disposal of the income is to be regulated and which would naturally find place in paragraph 1, between two clauses by which he gave his widow the most extensive powers of dealing with the property. We have also to attenuate the significance of, if not altogether to eliminate, the phrase " as to her may seem best ; " and we have to suppose that the testator did not contemplate the probability of his wife exercising the power which he expressly and immediately conferred upon her of selling all the " property " at a favourable opportunity. It is far easier, and it is, I think, far more reasonable, to construe the clause in question as enabling Mrs. McIvor to exercise her own discretion in the matter of expenditure on the maintenance of the property, especially when it is remembered that the testator was a childless husband making provision for his widow. I do not think that any indication of a trust is to be found in paragraph 10, and that being so the words 'in trust' in paragraph 1 do not present any great difficulty. I have had little doubt from the moment the Advocate-General read the will to us

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that the testator did not use these words in the technical sense in which a lawyer would use them. He did not intend to appoint his widow a trustee but merely intended to convey his desire that she should preserve the *corpus* of the estate until her death. But giving their legal effect to the words it seems clear that there is no beneficiary other than the trustee herself. Apart from paragraph 10, out of which no trust can be derived, there is nothing in the will to suggest that the testator contemplated the preservation of any of the income of the property, for the use of any person except his wife, while paragraph 1 indicates sufficiently clearly that the whole of it was intended for her use, described as her maintenance and support. The only trust which can be spelt out of the will is a conveyance to Mrs. McIvor in trust to pay an annuity to the testator's sister, and the rest of the income to herself for her life. It is said that it is not likely that the testator would have been at the pains to create a trust for such a purpose, but the answer seems to be that if we are to consider what it is likely that he meant to do we shall find that he did not intend to create any trust at all; but if, in order to give due effect to the language of the will, we have to hold that he did intend to declare a trust, then that is the trust which the will declares. None other can be found in it except by putting on paragraph 10 a construction which it cannot reasonably be expected to bear.

I, therefore, agree with the conclusions of the Subordinate Judge as a result of his construction of the will. As regards the question of fact, assuming it to arise, I think, it has been properly dealt with by the Subordinate Judge. Evidence that a coffee-estate which was under cultivation in 1876 is not now cultivated with coffee is, to my mind, hardly even *prima facie* evidence that it has been improperly treated or neglected and here there is evidence which explains the present condition of affairs without indicating that Mrs. McIvor is to blame for it. As regards the cross-appeal, I do not think it altogether likely that the testator was in the 1st clause of paragraph 10 intentionally making provision for the needs of his wife until the estate should be put in funds by the sale of crops, but whether that be so or not, the only evidence to which our attention was called, *i. e.*, the accounts, is insufficient to prove that the sums drawn from the banks were either utilized for the maintenance and support of Mrs. McIvor or

for the upkeep and working of the estate, or were required for either of those purposes.

I agree, therefore, in dismissing with costs both the appeal and the cross-appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Boddam.

Bhaskaruni Kesavarayadu .. Petitioner* (*Counter-Petitioner*).

v.

Bhaskaruni Chalapatirayadu .. Counter-Petitioner (*Petitioner*).

Kesavarayadu v. Chalapatirayadu.

Cr. P. C., S. 145—Applicability, to disputes as to possession between manager and member of a joint Hindu family.

The possession of the manager of a joint Hindu family as against another member can be protected by proceedings under S. 145, Cr. P. C.

Petition under Ss. 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of the Head Assistant Collector, Narasaraopeta, in possession case No. 4 of 1907.

V. Ramesam for petitioner.

P. R. Grant for *The Public Prosecutor* for the Crown.

G. Krishnaswami Aiyar for respondent.

In this case the petitioner and the respondent were members of a joint Hindu family and each claimed to be in possession of the immoveable property of the family as manager. Objection was taken before the trying Magistrate on the groundthat S. 145. did not apply to such a case. The Magistrate overruled the objection and passed an order in favour of the respondent. Hence this revision.

V. Ramesam for petitioner—cited *Tariyan Bibee* v. *Asamuddi Bepari*[1]; *Dharanikanta Lahiri* v. *Girijakanta Lahiri*[2]; *Radha Raman Ghose* v. *Baliram*[3]; *Nritta Gopala Singh* v. *Chandi Charan Singh*[4]; *Makhan Lal Roy* v. *Barada Kanta Roy*.[5] The case relied on by the Magistrate—*Sri Mohan Thakur* v. *Narsing Mohan Thakur*[6] was not approved in *Nritta Gopala Singh* v.

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* C.R.C. No. 435 of 1906; C.R.P. No. 319 of 1905. 7th April 1908.

1. (1900) 4 C. W. N. 426.
2. (1904) 8 C. W. N. 485.
3. (1904) I. L. R. 32 C 249.
4. (1906) 10 C. W. N. 1088.
5. (1906) 11 C. W. N. 512.
6. (1899) I. L. R. 27 C. 259.

Kesavarayadu v. Chalapatirayadu.

Chandi Charan Singh.[1] He also referred to Art 47 of the Limitation Act. The section applies only where the possession claimed is exclusive possession.

P. R. Grant—relied on *Sri Mohan Thakur* v. *Narsing Mohan Thakur.*[2]

The Court made the following

ORDER:—The finding is that the counter-petitioner is the managing member of the joint Hindu family that owns the property in dispute, and that, as such, he is in possession of the joint family property. We think that the view taken in *Sri Mohan Thakur* v. *Narsing Mohan Thakur* [2] is correct. The cases quoted by the petitioner are all either cases of co-trustees or of ordinary partners in which the rights of each trustee or partner are equal. None of them are cases like the present of a co-parcenary under the Mitakshara law, in which the managing member has a recognized position of superiority with well-defined rights of management and possession independent of the consent of the other members of the family.

Mr. Mayne, in para 292 of the 7th edition of his Hindu Law, when discussing the mode in which the joint family property is to be enjoyed by the co-parceners says: "In Malabar and Canara the head of the family is entitled to its entire possession and is absolute in its management," and also that "a family governed by the Mitakshara Law is in a very similar position except as to their rights to a partition and to an account as incident to that right." We do not see why a manager of a joint family should not be protected in his possession by proceedings under S. 145, Criminal Procedure Code.

We, therefore, hold that the Magistrate has jurisdiction to act under that section, and this Court has no jurisdiction to interfere. We dismiss the petition.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Miller.

Thenappa Chettiar and another .. Appellants* (*Plaintiffs*).

v.

Marimuthu Nadan and others .. Respondents (*Defendants*).

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* S. A. 177 of 1904. 3rd March 1908.

1. (1906) 10 C. W. N. 1088.

2. (1899) I. L. R. 27 C. 259.

Thenappa Chettiar v. Marimuthu Nadan.

Mortgage decree, form of—Interest, rate of—Suit by puisne mortgagee for redemption after decree previously obtained by prior mortgagee without impleading puisne mortgagee.

A prior mortgagee brought a suit for sale, obtained a decree, and purchased the properties himself. The prior mortgagee was not aware of a second mortgage on the property and consequently did not implead the puisne mortgagee *Held*: that in a suit for redemption by the puisne mortgagee, the prior mortgagee should be allowed interest on the mortgage amount at the contract rate up to the date fixed in the decree for redemption. The prior decree obtained by the prior mortgagee can only operate as between the parties to the suit and those who claim under them; and it would be unjust if the puisne mortgagee is allowed to use the prior decree to cut down the prior mortgagee of her interest, while he deprives her of the whole advantage of it.

[*Umes Chundar Sircar* v. *Zahur Fatima*[1] explained and followed.]

Semble:—The equitable considerations which appear to have prevailed with the Judges in *Gangadas Bhattar* v. *Jogendra Nath Mitter*[2] are applicable only to a case where the prior mortgagee has omitted to implead the puisne mortgagee with knowledge of his existence.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 938 of 1902 presented against the decree of the Court of the District Munsiff of Kumbakonam in O. S. No. 230 of 1901.

K. Srinivasa Aiyangar for appellants.

P. Anandacharlu and *K. Ramachandra Aiyar* for respondents.

The Court delivered the following

JUDGMENT:—The plaintiffs are mortgagees of certain property including items Nos. 2 and 4 The 3rd and 4th defendants are prior mortgagees of those two items. The 3rd defendant sued on his mortgage in O. S. No. 2 of 1900, making 4th defendant a party but not the plaintiffs. The 3rd defendant himself purchased item No. 2 at the sale held under the decree obtained by him in his suit, and the 4th defendant purchased item No. 4 at the same sale. The plaintiffs have now to redeem the prior mortgages, and the present question is as to the conditions of redemption. The plaintiffs claim to proceed on the footing that the mortgages were enforced by the decree in O. S. No. 2 of 1900 and to take the account on that footing; the prior mortgagees claim payment on the footing that their mortgages are still existing. The practical question is one of the rate of interest to be paid on the mortgage money In our opinion, the decision of the Privy Council in *Umes Chunder Sircar* v. *Zahur Fatima*[1]

1. (1839) I. L. R. 18 C. 164. 2 (1907) 11 C. W. N. 408.

Thenappa Chettiar v. Marimuthu Nadan.

concludes the question of the terms of redemption, and we cannot, therefore, follow the case of *Gangadas Bhattar* v. *Jogendra Nath Mitter*.[1] The learned judges do in that case, no doubt, find themselves able to hold that their decision is not inconsistent with that of the Privy Council. But we find ourselves unable to reconcile the two cases. It is true that the Privy Council allow interest at the contract rate only up to the date on which Zahur, the prior mortgagee, took possession under the sale held in execution of her own decree, but the reason for that is clearly explained by their Lordships at the top of page 180 of the report in the Calcutta series, and there is nothing to indicate that the interest after possession, which they held might fairly be taken to be equivalent to the profits, was interest at the *post diem* rate awarded by the Court, and not interest at the rate provided by the contract.

On the other hand, their Lordships' observations show clearly, we think, that the decree in the prior mortgagees' suit is to be disregarded in considering the terms of redemption as between the prior and puisne mortgagees.

After pointing out wherein lies the Court's power to regulate interest after decree, their Lordships continue: "the decree can only operate as between the parties to the suit and those who claim under them. The plaintiff getting the security of a decree has his interest reduced in the generality of cases. But the plaintiff in this case comes to take away from Zahur the benefit of the decree. It would be unjust if he could use the decree to cut down her interest, while he deprives her of the whole advantage of it. His case is that, as to him, Zahur is still but a mortgagee, and if so, she should be allowed such benefit as her mortgage gives her. If Zahur had not got a decree and the plaintiff had come to redeem her mortgage, he must have paid whatever interest her contract entitled her to; and the Court would have had no jurisdiction to cut it down, and that is the position in which the parties are placed by the decree in this suit."

This passage from their Lorships' judgment leaves no room for the contention urged before us that the puisne mortgagee ought to be allowed to choose whether to adopt or to disregard the account directed by the decree. To allow him to do so would be to allow him to do what their Lordships say it would be *unjust*

1. (1907) 11 C. W. N. 403.

Thenappa Chettiar v. Marimuthu Nadan.

to allow him to do. The fact is that, the puisne mortgagee not being a party, the suit ought not to affect either his rights or his liabilities. It is contended that the prior mortgagee, by excluding him from the suit, can obtain an advantage for himself, but that advantage is entirely dependent on the will of the puisne mortgagee; he can redeem when he pleases, before, pending, or after, the suit. If he has no notice of the prior incumbrance or of the suit, he is no worse off after the decree than before the suit. Either way he is bound by the prior mortgage.

The equitable considerations which appear to have prevailed with the learned Judges in *Gangadas Bhattar* v. *Jogendra Nath Mitter*[1] seem to be applicable only to a case in which the prior mortgagee has notice of the subsequent encumbrance, and the subsequent encumbrancer has no notice of the prior mortgage. In such a case it may be just to penalize the prior mortgagee for his disregard of the provisions of S. 85 of the Transfer of Property Act. The present case is not such a case, and is, we think, covered by the Privy Council decision.

The District Judge has taken an account of the profits received by the prior mortgagee after entering into possession, and has set them off against the interest. That being so, we do not think we can take the profits as the equivalent of the interest, as was done in the Privy Council case. The rule there adopted is not laid down as a rule of law but as a rule "just and convenient and not objected to by either party."

We, therefore, accept the District Judge's finding and adopt his account for the final decree. If the plaintiffs do not redeem the 3rd and 4th defendants, the plaintiffs will have no costs from the 3rd and 4th defendants and will pay their costs. Six months will be allowed for redemption.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis and Mr. Justice Munro.

Vellankondu Subbiah and others .. Appellants* (*Defendants*).

v.

Malapeddi Venkataramiah .. Respondent (*Plaintiff*).

* S A. 741 of 1906. 13th March 1908.

1. (1907) 11 C. W. N. 403.

Subbiah v. Venkataramiah.

Partnership—Right of suit by one member against another on pronote executed in his favor by the others—Unliquidated claim—Hindu law—Joint family—Liability of other members.

A suit is maintainable by one member of a firm upon a pro-note given him by two other members of the firm in respect of an advance made by him to the firm ; and it is not competent to the other members to set off any unliquidated claim they may have against the plaintiff in respect of the partnership.

The suit on the pro-note is not a suit against the firm by one of its members.

The members of a Hindu joint family cannot be made liable in respect of a partnership debt incurred by one of the members unless it be that the other members of the joint family are interested in the partnership.

[*Krishna Ayyar* v. *Krishnasami Ayyar*[1] referred to.]

Second appeal from the decree of the District Court of Cuddapah in A. S. No. 98 of 1905 presented against the decree of the Court of the District Munsif of Proddatur in O. S. No. 234 of 1905.

L. A. Govinda Raghava Aiyar and *A. Ramachandra Aiyar* for appellants.

I. V. Ramanuja Rao for respondent.

The Court delivered the following

JUDGMENT :—This is a suit by one partner against two other partners upon a promissory note given by them, and the members of their respective joint families have also been joined as defendants. The District Judge has found that accounts between the partners were settled and a balance found due to the plaintiff, and that the partnership was thereupon dissolved and the promissory note given to the plaintiff for the amount of the balance. For the appellants it is contended that the evidence for the defence shows clearly that this was not so, and that the promissory note was given in repayment of an advance made by the plaintiff to the partnership with interest, and that at the time it was given the general accounts of the partnership had not been taken. If this be so, then it is contended that one partner cannot maintain a suit against the other partners upon a promissory note so given. We are unable to agree with this contention. No doubt the proper remedy of one partner against the other members of the firm is ordinarily a suit for a dissolution of partnership, and one partner has been held not entitled to maintain a suit, other than a suit for dissolution, against the other members of the firm in respect

1. (1900) I. L. R. 23 M. 597.

Subbiah v. Venkataramiah.

of partnership transactions, on the ground that the plaintiff, as a member of the firm, would be a necessary defendant, and that a man cannot maintain a suit against himself—*Rustomji* v. *Sheth Purshotamdas*.[1] This, however, is not a suit against a firm by one of the members of the firm, but a suit by one member of the firm, upon a promissory note given him by two other members of the firm in respect of an advance made by him to the firm and interest thereon. It is not contended that the note is without consideration or that the consideration has failed, but it is said that when the accounts are taken it may appear that there is nothing due to the plaintiff. If this had been so, the defendants would hardly have given the note; but, in any case, it only comes to this, that the defendants have an unliquidated claim against the plaintiff. They are not entitled in law to set off an unliquidated claim; indeed they have not pleaded set off. In our opinion, defendants Nos. 1 and 2, the makers of the note, have no answer to the suit. As regards the other defendants, the District Judge states that they are members of the undivided families of one or other of the defendants, and interested in their joint trade; but this appears to be merely a statement of the plaintiff's case, as there is no evidence to show that the joint families were interested in the joint trade, and it is not admitted but denied. Under these circumstances they cannot be made liable either on the note or under Hindu law as explained in *Krishna Ayyar* v. *Krishnasami Ayyar*.[2] As regards them the appeal must be allowed with costs. As against defendant No. 2, the second appeal must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Munro.

The Mylapore Hindu Permanent Fund Limited .. Appellant* (*Plaintiff*).

v.

The Corporation of Madras .. Respondent (*Defendant*).

The Mylapore Fund v. The Madras Corportation.

Madras Acts—City Municipal Act III of 1904, S. 176, Sch. V—"Capital"—Meaning of—Statutes—Interpretation—Principles.

Held:—That the word "capital" in Schedule V of the Madras City Municipal Act III of 1904 does not mean exclusively nominal capital.

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* R. C. No. 20 of 1907. 6th April 1908.

1. (1901) I. L. R. 25 B. 606.

2. (1900) I. L. R. 23 M. 597.

The Mylapore Fund v. The Madras Corporation.

Held also · that in the case of the Fund in question having a declared nominal capital of Rs. 29,99,976 divided into 357,168 shares of Rs. 84 each, subscribed for by payment of Re. 1 per mensem over a period of 7 years, (the payment not being demandable in advance) the word capital should be interpreted only as "paid-up capital."

The ordinary and popular meaning of the word "capital" is money actually contributed for employment in business.

The underlying principle of Schedule V seems to be that taxation should be roughly proportionate to the professional incomes of individuals and the profits of companies.

The subject is not to be taxed unless the language of the statute clearly imposes the obligation and in case of reasonable doubt the construction most beneficial to the subject is to be adopted.

The Indian Companies Act cannot be resorted to in the interpretation of the Madras City Municipal Act, as the two Acts are not *in pari materia*.

In construing an Act, in the absence of a definition of a word in the Act itself, the presumption is that the word is used in the Act in its ordinary and popular meaning.

S. 176 of the Madras City Municipal Act hardly contemplates a reference in general and abstract terms. It only empowers the magistrates to state a case on any appeal before them and refer the same for the decision of the High Court, *i. e.*, to state all the matters necessary for the decision of the particular case before them on appeal and to refer the case so stated for decision.

Case stated under S. 176 of Act III of 1904 by the Chief Presidency Magistrate of Egmore, in Application No. 8974 of 1907.

L. A. Govinda Raghava Aiyar for the appellant.

T. V. Seshagiri Aiyar for the respondent.

The Court delivered the following

JUDGMENT:—The question referred for our decision is "Does the word 'capital' used in Schedule V of the Municipal Act III of 1904 mean exclusively nominal capital or does it also include paid-up capital and, if so, should it be taken to mean paid-up capital exclusively?

The law (S. 176, Madras City Municipal Act, 1904) hardly contemplates a reference in such general and abstract terms. It only empowers the Magistrates to state a case on any appeal before them and refer the same for the decision of the High Court, that is, to state all the matters necessary for the decision of the particular case before them on appeal and to refer the case so stated for decision. The facts are, however, fully stated in the reference, and we proceed to deal with them.

The case arises out of a dispute between the Madras Municipality and the Mylapore Hindu Permanent Fund, Limited, as to

the basis on which the fund should be charged with professional tax. . The Municipality claims to tax the fund under Cl. I (*a*) of Schedule V on its nominal capital. The Fund contends that it should be taxed under Cl. I (*b*) of the Schedule on its paid-up capital.

Under Cl. I (*a*) joint stock companies and other companies carrying on any trade or business having gain for its object, or as benefit societies, and the capital of which exceeds 20 lakhs of rupees are liable to a tax of Rs. 500. Under Cl. I (*b*) the companies are liable to a tax of Rs. 350 if their capital exceeds 18 lakhs but does not exceed 20 lakhs of rupees.

The fund is registered under the Indian Companies Act and has a declared nominal capital of Rs. 29,99,976 divided into 357,168 shares of Rs. 84 of each.

These shares cannot be acquired at once by a lump payment but are subscribed for by payment of one rupee *per mensem* extending over a period of 7 years which payments cannot be demanded in advance. It is admitted for the purpose of the present reference that the amount actually subscribed or the paid-up capital, is about 12 lakhs of rupees.

It will be observed that in Schedule V the word "capital" is used without any qualification. No definition of the word is given in the Act. For the Municipality it is contended that the meaning of the word will vary according to the nature of the Company which is being taxed.

It is pointed out that the Fund is a Company limited by shares such as is contemplated by Ss. 8 and 45 of the Indian Companies Act VI of 1882 and that in those sections capital is used in the sense of nominal capital. It is, therefore, argued that the word capital in Schedule V used in regard to Companies such as the fund must mean nominal capital. The Indian Companies Act cannot, however, be properly resorted to to determine the meaning of words in the Municipal Act, for the two acts are not *in pari materia*. (Maxwell : Interpretation of Statutes, 4th edition, page 56). The word " capital " used by itself may signify many different things. In the absence of a definition in the Municipal Act the presumption is that the word is used in that Act in its ordinary and popular meaning—Maxwell: Interpretation of Statutes,

The Mylapore Fund v. The Madras Corporation.

4th edition on page 2, and *Venkatram Chetty* v. *The Emperor*.[1] The ordinary and popular meaning of the word is undoubtedly money actually contributed for employment in business. It is defined in Wharton's Law Lexicon as the sum of money which a merchant, banker, or trader adventures in any undertaking or which he contributes to the common stock of a partnership, and also as the fund of a trading company or Corporation. The ordinary and popular meaning seems to express the real intention of the Legislature. When Schedule V is read as a whole the underlying principle seems to be that taxation should be roughly proportionate to the professional incomes of individuals and the profits of companies. S. 123 of the Act which lays down that a person who exercises more than one profession shall be chargeable under the class appropriate to his aggregate income, supports this view; other things being equal the profits of a company will ordinarily vary with the amount of money actually employed in its business; and this amount will be limited by the amount actually contributed for employment in the business; in other words, by the paid-up capital. Schedule V of the present Municipal Act is in everything material to our present purpose, the same as Schedule A of the Madras City Municipal Act I of 1884. The case in *Madras Equitable Assurance Company* v. *The President, Municipal Commission, Madras*[2] and *Jennings* v. *The President, Municipal Commission, Madras*[3] are cases under the latter Act. In the former case it was laid down that, in the case of Benefit Societies the aggregate of the sums contributed would constitute the capital of the society, the word " capital " in the Act being used in its general sense. In the other case, it was remarked that the Cls. (*a*) to (*d*) of Cl. 1 of Schedule A were framed to provide a sliding scale of taxes with reference to the amount of the capital employed in the business carried on by the companies described in Cl. I (*a*). The fact that neither of the companies dealt with in the above cases had a declared nominal capital, can make no difference in principle. Finally, the subject is not to be taxed unless the language of the statute clearly imposes the obligation, and in case of reasonable doubt the construction most beneficial to the subject is to be adopted—Maxwell : Interpretation of Statutes, 4th edition, page 431. Our decision, therefore, is that,

1. (1904) I. L. R. 28 M. 17. 2. (1887) I. L. R. 11 M. 238.
3. (1887) I. L. R. 11 M. 253.

with reference to the Mylapore Hindu Permanent Fund, Limited, the word "Capital" in Schedule V of the Madras Municipal Act [III of 1904] means paid-up capital.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Sankaran Nair.

A. P. Pachaiperumal Chettiar .. Appellant* (*Plaintiff*).

v.

Dasi Thangam .. Respondent (*Defendant*).

Pachaiperumal Chettiar v. Dasi Thangam.

Tort—Libel—Defamation—Privilege—Accused person—Reply to notice.

No action for libel or slander lies whether against judges, counsel, witnesses or parties for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognised by law. This principle applies equally in the case of accused persons in respect of words written or spoken for purposes of defence.

This privilege extends to statements made in reply to notices of action so long as the allegation is confined to the matter in hand and is relevant.

Second appeal from the decree of the Subordinate Judge's Court of Tuticorin in A. S. No. 233 of 1905 presented against the decree of the Court of the District Munsif of Tuticorin in O. S. No. 231 of 1904.

K. Narayana Rao and *G. Annaji Rao* for appellant.

V. C. Sesha Chariar for respondent.

The Court delivered the following

JUDGMENT:—This is a suit for damages. The circumstances out of which it arose are as follows:—The defendant, a Dasi, was accused of rioting, by a person who is admittedly a servant of the plaintiff. When he was being examined as a witness the defendant instructed her pleader to put certain questions to him which implied that the charge was brought at the instigation of the plaintiff on account of the ill-feeling which he entertained towards her. The defendant repeated these statements in a reply to a notice sent by the plaintiff to her. The defendant claims privilege. She also pleads the truth of her statements.

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* S. A. 250 of 1906. 31st March 1908.

Pachaiperumal Chettiar v. Dasi Thangam.

The rule of English law that "no action of libel or slander lies whether against judges, counsel, witnesses, or parties for words written or spoken in the ordinary course of any proceeding before any Court or tribunal recognised by law" has been applied in this Presidency to Judges in *Raman Nayar* v. *Subrahmanya Ayyan*[1]; to witnesses in many cases—see *In the matter of Alraja Naidu*[2]—and to counsel in *Sullivan* v. *Norton.*[3] The principle on which this rule is based would seem to apply also to an accused person, as it is essential to the administration of justice that those who are protecting their own interests should be under no apprehension of any proceedings from the opposite party. It has been held in *Trotman* v. *Dunn*[4] that if the words were used for the purpose of 'defence' then a person is justified in using them. In this case the judge has found that the questions were put in good faith.

We, are therefore, of opinion that the defendant is not liable for the imputations made in the questions put to the witness. It is further argued that the defendant is not entitled to claim privilege for the statements in her reply as they were not made in the course of any judicial proceeding. But the defendant is entitled to reply to the notice sent to her and to state her reasons; such reply, it has been held, is privileged so long as it is confined to the matter in hand and is relevant. The defendant in the present case did no more than acknowledge, having made these imputations before. The plaintiff can, therefore, only rely upon the words previously spoken and use this reply to prove that the imputations were made. It is true that, if the defendant had published this reply she could not claim any privilege, and the appellant contends that it is admitted by one of the defendant's witnesses that one Nilakanta Iyer was aware of this reply. But we cannot allow the plaintiff to rely upon this fact as any such publication by the defendant was never alleged. On this point also, we agree with the lower appellate court.

We, therefore, dismiss the second appeal with costs.

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1. (1893) I. L. R. 17 M. 87.
2. (1900) I. L. R. 30 M. 222.
3. (1886) I. L. R. 10 M. 28 at p. 35.
4. (1815) 4 Campb. 211.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF JUDICATURE AT BOMBAY.]

Present :—Lord Macnaghten, Lord James of Hereford, Lord Atkinson, Sir Andrew Scoble and Sir Arthur Wilson.

The Bank of Bombay .. Appellant*

v.

Suleman Somji .. Respondent.

The Bank of Bombay. v. Suleman Somji.

Corporation—Member of the Corporation—Common Law right of member to inspect books of the Corporation—Presidency Banks Act (XI of 1876)—Bank of Bombay—Shareholder—Suit by shareholder against the Bank to enforce inspection of the register of shareholders—Allegations of irregularities in the management of the Bank, in the election of its Board of Directors, and in the advancing of money to Directors—Object of inspection to communicate with other shareholders—Nature of the suit—Issue of the Writ of Mandamus, principles of, regulating the right under statute—Common Law Right—Absolute right of inspection—Qualified or limited right of inspection.

At Common Law, members of a Corporation have no absolute right, whenever they think fit, to inspect all papers belonging to the aggregate body. The privilege of inspection is confined to cases where the member of a Corporation has in view some definite right or object of his own, and to those documents which would tend to illustrate such right or object. *Taylor on Evidence, Vol. 2, para 1495, approved and followed.*

On the application of a member, the King's Bench Division will, in general, grant a rule for a *limited* inspection of the documents of the corporation, if it be shown that such inspection is requisite with reference either to an action then instituted or at least to some specific dispute or question pending in which the applicant is interested; but, even in this case, the inspection will be granted to such an extent only as may be necessary for the particular occasion.

The respondent was a holder of one share in the Bank of Bombay. He claimed a right to inspect the register of the shareholders of the Bank, and to be supplied with a list of such shareholders, as absolute and unqualified as is that conferred on the shareholders of Joint Stock Companies in England by S. 32 of the Companies Act, 1862, or in India by S. 31 of the Indian Companies Act, 1866, and S. 55 of the Indian Companies Act, 1882. The appellant refused to recognize that absolute and unqualified right, or to comply with the claim based upon it, but in their letter which conveyed that refusal, they informed the respondent that they would be pleased to furnish him with the list he asked for if he would satisfy them that he required it for use in his own interests as a shareholder. In the statement of claim the respondent, for the first time, endeavoured explicitly to base his right and title to inspect, copy, and take extracts from, the register on some definite matters in which he himself was interested. He alleged therein that he had observed irregularities in the management of the Bank, in the election of its Board of Directors, in the advancing of large sums of money to its Directors, and in other matters, and that he desired an inspection of the register to enable him to communicate with the other shareholders, and, if possible, obtain their assent to certain resolutions for the better management of the affairs of

1908, May 13th & June 2nd.

* 2

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the Bank and the removal of some of the Directors, which he intended to propose at the next general meeting of the shareholders.

Held, that the suit was in truth in its nature, though not in its form, somewhat of the character of an application for a *writ of mandamus*, and the principles regulating the issue of that prerogative writ should apply to a great extent to the granting of the relief prayed for in a suit like the present suit. Mandamus would not be allowed to issue unless the applicant showed clearly that he had the specific legal right to enforce which he asked for the interference of the Court, that he had claimed to exercise that right and none other, and that his claim had been refused.

A *writ of mandamus* for inspection of registers would not be issued if the object of the applicant is merely to see "if by possibility the Company's affairs may be better administered than he thinks they are" and not any definite right or object of special interest to the applicant as distinguished from that of his fellow members.

[*Rex* v. *Merchant Tailors' Co.*[1] followed.]

Held also, that there was no statute conferring on the members of the Bank of Bombay a right to inspect, copy, or take extracts from, the register of its shareholders or any other document belonging to it, and the only right the respondent could have, therefore, against the Bank in reference to such matters, was that which at common law belonged to every member of a Corporation.

Held further, that the respondent was not in law entitled to the extended right to which the decree of the Court of Appeal declared him to be entitled, and that the limited and qualified right contended for at the trial was never put forward, or insisted on, before action brought, or any claim based upon it ever refused.

Appeal from an appellate decree of the High Court of Judicature at Bombay reversing a decree[2] made by *Scott* J. sitting on the Original Side of that High Court.

Levett K. C. and *Frank Russel* K. C. for appellant.

De Gruyther K. C. and *S. A. Kyffin* for respondent.

The principal question raised on the appeal was whether the respondent, a shareholder in the appellant Bank, was entitled to inspect the register of shareholders kept by the Bank.

On July 11, 1906, the respondent instituted the present suit against the appellant. The plaint alleged that the respondent was a registered holder of one share of the appellant Bank ; that the respondent having observed irregularities in the management of the Bank, in the election of its Board of Directors, in the advancing of large sums of money to its Directors, and in other matters relating to the Bank, applied to the Secretary and Treasurer of the Bank to allow him inspection of the register of shareholders so as to enable him to communicate with the

1. (1831) 2 B & Ad. 115.

2. (1907) *Suleman Somji* v. The *Bank of Bombay*, I.L.R. 31 B. 319.

other shareholders, and if possible, to obtain their assent to certain proposed resolutions, for the better management of the affairs of the Bank, and for the removal of some of the existing Directors, which he intended to bring before a general meeting of the shareholders ; and that the next Annual General Meeting of the shareholders of the Bank would take place on or about the 9th day of August 1906, and though it was necessary for the objects which the respondent had in view that he should have inspection of the register of shareholders forthwith, the Bank had refused to give him inspection of such register though since the 4th day of June 1907 he had repeatedly applied for the same.

Annexed to the plaint was a copy of the correspondence hereinafter referred to.

The respondent claimed the following main reliefs :—

(*a*) "That it may be declared that he is entitled at all "reasonable times to inspect the register of shareholders of the "defendant Bank and to copy and take extracts from the said "register."

(*b*) "That the defendant Bank may be ordered to give such "inspection and to allow the plaintiff to take copies of and ex-"tracts from the said register."

(*c*) "That the defendant Bank may be restrained by an "order and injunction from preventing the plaintiff from having "access at all reasonable times to the said register of shareholders "for the purpose of inspection and perusal, and from preventing "the plaintiff from taking copies of and extracts from the said "register."

On June 4th, 1906, the respondent wrote to the Secretary of the Bank a letter, which referred to a verbal refusal by the latter on the 1st of June, 1906, "to allow me (the respondent) to take a list of shareholders with full addresses," and closed with a request to furnish him "a list of shareholders with their full addresses on paying for the same."

To that letter the Bank replied on June 7, 1906, that there did not appear to be any provision in the Presidency Banks Act as to the right of a shareholder or other person to claim such a list, but that to enable the Directors to decide definitely on the

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requisitions the respondent should state " for what purpose and under what authority" he required and claimed to be furnished with the list.

To the last letter the respondent replied on the 16th day of June 1906 by threatening legal action to compel the Bank to furnish the list or to give him inspection, and he added that he was informed that the Bank had " furnished such lists in other cases."

On June 21, 1906, the Bank replied that " such a list was supplied to a shareholder a few years ago on his satisfying the Board that the purpose for which he required the list was a legitimate one and in his *bona fide* interest as a shareholder " and added " the Directors will be pleased to comply with your request if you will be good enough to similarly satisfy them that you require the list for use in your interest as a shareholder."

On July 5, 1906, the respondent wrote in reply: "It is unfair " to me to be asked to state why I require the inspection. There " have been gross irregularities in the management of the Bank, " in the election of the Directors, in the manner the Directors " act, and other matters, and you preclude me from communicat- " ing with the shareholders or taking concerted action by with- " holding the inspection."

" Please take notice that I have instructed Solicitors to " prepare papers to file a suit which will be done within three " days from this date unless the inspection is given to me before " then."

The issues settled were the following :—

1. Whether the plaintiff had at the date of the filing of this suit any cause of action against the defendant Bank ?

2. Whether the plaintiff required inspection for the protection of his own interests or for any other reasonable purpose ?

3. Whether the plaintiff is entitled to the relief he seeks in prayers A and B ? "

The respondent's counsel did not lead any evidence but tendered the respondent for cross-examination, of which the following is material for the purpose of this report :—

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" I hold one share in the Bank. I purchased it last April.
" I am at present actively litigating a suit in which the Bank
" is a formal party as assignor of Dwarkadas Dharamsey."

" Are you on very hostile terms with a director ? "

Objected to.

Witness at once answers :—No !

" I had no litigation with Ahmedbhoy Habibhoy, but my " brothers had. They are still fighting. I have given reasons " in correspondence for wanting inspection. I have also given " some reasons in the plaint. I have other reasons also. I " began taking an interest in the affairs of the Bank about six " months ago. I bought the share as an investment with my " own monies. I complain of irregularities in the management " of the Bank. I discovered them in April after I bought the " share. I bought the share on the 12th. It was transferred " to me on the 18th April. The irregularity is that the Bank has " advanced money to people beyond the limit fixed by the bye- " laws. The amount fixed by the bye-laws is 6 lacs. They have " advanced more than 6 lacs to several persons, *viz* :—

" BANSILAL ABIRCHAND.

" BOMANJI DINSHAW PETIT SONS & CO.

" AHMEDBHAI HABIBBHOY.

" I don't recollect any other names. They advanced Bansi- " lal every month 6 lacs under a contract for 12 months, *i.e.*, 18 " lacs for three months. I found this out by seeing Bansilal, " Bomanji and Ahmedbhai going to the Bank. I got this infor- " mation through brokers. There are irregularities also in the elec- " tion of the Board of Directors. The Directors have shares trans- " ferred to their nominees. They get themselves elected and sit " on the Board. All the Directors do the same when their term " comes to get themselves re-elected. I also complain that there " are now 7 Directors whereas there ought to be 9, and I intended " to bring in two respectable people."

The case was heard by *Scott* J. who found all the issues in the negative and on August 6, 1906, dismissed the suit. For a report of the judgment see *Suleman Somji* v. *The Bank of Bombay.*[1]

1. (1907) I. L. R. 31 B. 319.

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Against that decree the respondent appealed to the Appellate Side of the High Court, and on January 22, 1907, the Court of Appeal reversed the decision of *Scott* J. and made a decree in the following terms:—

" This Appellate Court doth reverse and set aside the said " decree dated the sixth day of August one thousand nine hundr- " ed and six and in lieu thereof doth declare that the appellant " as long as he is a shareholder of the said Bank is entitled " at all reasonable times to inspect the register of shareholders " of the respondent Bank and to copy and take extracts from the " said register and this Appellate Court doth order that the " respondent Bank do give such inspection and do allow the " appellant as long as he is a shareholder of the said Bank to " take copies of and extracts from the said register and this " Appellate Court doth further order that the respondent Bank is " hereby restrained from preventing the appellant as long as he is " a shareholder of the said Bank from having access at all reason- " able times to the said register of shareholders for the purpose of " inspection and perusal and from preventing the appellant " as long as he is a shareholder of the said Bank from taking " copies of and extracts from the said register and this Appellate " Court doth lastly order that the respondent Bank do pay to the " appellant his costs of the above mentioned suit and of this " appeal when taxed."

For a report of the judgment see *Suleman Somji* v. *The Bank of Bombay*[1].

The appellant Bank, thereupon, appealed to His Majesty in Council.

Levett K. C., and *Frank Russell* K. C. referred to the Presidency Banks Act (XI of 1876), Ss. 1, 4, 7, 17, 22, 31, 37 and 68; and to the Indian Companies Act (X of 1866) S. 231; and also to the Indian Companies Act (VI of 1882) Ss. 55 and 256. The Presidency Banks have been expressly exempted from the application of the Indian Companies Act to them. The provisions relating to the inspection of the register of shareholders by a shareholder of a joint-stock Company registered under the Indian Companies Act are not applicable to this case, and under the Presidency Banks Act of 1876 the Bank's shareholders are

1. (1907) I. L. R. 31 B 319

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not entitled to inspect the Bank's register of shareholders, or to copy or take extracts therefrom. The respondent must establish his right, if any, at common law. Subject to the provisions of the Presidency Banks Act a shareholder possesses and enjoys all rights, powers and immunities incident by law to a Corporation aggregate—the Presidency Banks Act (XI of 1876) S. 4. The Common Law principle on which inspection is given is that the application must be a *bona fide* application referring to a definite subject affecting the right of the shareholder or member of a Corporation. The evidence shows that the respondent had three grievances, namely, irregularities in the management of the Bank, in the election of its Directors, and in the advancing of large sums of money to its Directors. There is no single case of grievance, which affects individual right. There is no reference to some defined, distinct dispute, as to which it appears that it might be to the advantage of the respondent to see the register of shareholders of the Bank. In such a case he is not entitled to such inspection: *In re Burton and the Sadlers Company*[1]; *King* v. *The Merchant Toilors' Company*[2]; *King* v. *The Wilts and Berk Canal Navigation*[3]; and *Taylor on Evidence* (1906 *ed.*) *Vol.* 11, *p.* 1088, *para* 1495.

The decree appealed from is wrong in any event because it is not confined to the actual occasion in question and the facts before the Court, but gives to the respondent at all times hereafter, while a shareholder, the right to inspect and take copies, without regard to any circumstances which may hereafter arise, in which a refusal by the Bank would or might be expedient and proper.

De Gruyther, K. C., *and S. A. Kyffin*—The history of the Presidency Banks Act goes back as far as 1823. There was first the Charter of the Bank of Bengal dated 29th May, 1823, which was rescinded and cancelled by The Bank of Bengal Act (VI of 1839). The latter Act was repealed by the Bank of Bengal Act (IV of 1862). Lastly there was The Presidency Banks Act (XI of 1876) Act VI of 1839, Ss. 11 and 13 make provision for an annual general meeting of the proprietors of the Bank to elect by their votes two directors out of six in place of those

1. (1861) 31 L. J. N. S. Q. B. 62. 2. (1831) 2 B. and Ad. 115
3. (1835) 3 A. & E. 477.

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bound to retire in rotation every year. Act XI of 1876, S. 24, provides that the directors of the Bank shall be selected by vote at a general or special meeting. The respondent desired inspection of the register of shareholders to enable him to communicate with other shareholders in order to obtain their assent to certain porposed resolutions for the removal of some of the directors, which he intended to bring before a general meeting of the shareholders. That is a specific question in which the respondent is *bona fide* interested. It is submitted that the Court of Appeal was right and its decree should be confirmed.

Up to 1866 the Bank of Bombay did not exist, but in 1867 it was incorporated and registered under the Indian Companies Act 1866 and then the Presidency Banks Act was passed. It is submitted that the latter Act does not deprive the respondent of the statutory right of inspection conferred by the Indian Companies Act.

The Bank is an ordinary banking company and the right must depend upon the nature of the book the respondent wants to examine. He wants to examine the register of shareholders. Inspection of that book does not interfere with the ordinary business of the Company.

[*Lord Macnaghten* : The inspection was not refused.]

Mr. De Gruyther : It is alleged in the plaint that the inspection was refused.

[*Lord Atkinson* : There is no evidence to show that.]

[*Lord Macnaghten* : You have never been refused inspection.]

De Gruyther : Every shareholder has an absolute right to inspect the register of shareholders without stating any reason. The respondent in the circumstances of this case and as of right was and is entitled to the inspection claimed by him of the register of shareholders of the Bank. Reference was made to the Presidency Bank Act (XI of 1876) S. 31 : and *Mutter* v. *Eastern and Midland Railway Company*[1]; and to American Cases, namely *In re Steinway*[2] and *State of Washington* v. *Pacific Brewing and*

1. (1888) 38 Ch. D. 92, at pp. 105 and 106.
2. The Lawyers' Reports annotated. Book 45, pp. 461 to 475, and 159 N.Y. 250.

Malting Company,[1] referred by the Court of Appeal in its judgment, were relied upon.

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J. *Levett, K.C.* replied.

Their Lordships' judgment was delivered by

Lord Atkinson.—This is an appeal from a decree, dated the 22nd January 1907, pronounced by the High Court of Judicature at Bombay (sitting in appeal from its Original Civil Jurisdiction), by which a decree, dated the 6th August 1906, of the High Court (sitting in its Ordinary Original Civil Jurisdiction) was reversed and set aside. By this latter decree the respondent's action was dismissed with costs.

The respondent is a holder of one share in the appellant Company, the Bank of Bombay, one of the Banks incorporated in 1876 by the Indian Statute of that year entitled the Presidency Banks Act, 1876.

It was suggested that the respondent purchased this share for the purpose of causing annoyance to the Bank owing to the fact that some other litigation to which he was a party had been instituted against the Bank and was still pending. There was no satisfactory evidence given to sustain this allegation.

From the correspondence which took place between the respondent and the Bank before the institution of this suit, it is, in the opinion of their Lordships, perfectly plain that the respondent claimed a right to inspect the register of shareholders of the Bank, and to be supplied with a list of such shareholders, as absolute and unqualified as is that conferred on the shareholders of joint stock companies in this country by S. 32 of the Companies Act, 1862, or in India by S. 31 of the Indian Companies Act, 1866, and S. 55 of the Indian Companies Act, 1882.

It must be taken that the appellants refused to recognize this absolute and unqualified right, or to comply with the claim based upon it, but in their letter of the 21st June 1906, which conveyed this refusal, they informed the respondent that they would be pleased to furnish him with the list he asked for if he would satisfy them that he required it for use in his own interests as a shareholder. It is, therefore, clear that, before action brought, the qualified and restricted right to inspect and take extracts from

1. The Lawyers Reports annotated Book 47. p. 208.

the register contended for in argument on behalf of the respondent was never asserted, nor any limited demand based upon it ever made or refused.

In the statement of claim the respondent, for the first time, endeavoured explicitly to base his right and title to inspect, copy, and take extracts from, the register on some definite matters in which he himself was interested. He alleges therein that he had observed irregularities in the management of the Bank, in the election of its Board of Directors, in the advancing of large sums of money to its Directors, and in other matters, and that he desired an inspection of the register to enable him to communicate with the other shareholders and, if possible, obtain their assent to certain resolutions for the better management of the affairs of the Bank and the removal of some of the Directors, which he intended to propose at the general meeting of the shareholders to take place on the 9th August 1906. But though this is the purpose for which, and the occasion on which, he claimed the right to inspect, copy, and take extracts from the register, the decree of the Court of appeal contains no restriction whatever. It is couched in the widest terms. It ignores both the occasion and the purpose, and declares expressly that the respondent, as long as he is a shareholder of the Bank, is entitled at all reasonable times to inspect the register of shareholders of the Bank, and to copy and take extracts from the said register, and it then proceeds to order that the Bank do give such inspection, and do allow the respondent, as long as he is a shareholder of the Bank, to take copies of and extracts from the register, and then restrains the Bank from preventing the respondent, as long as he is a shareholder of the Bank, from having access at all reasonable times to the register for the purpose of inspection and perusal, and from preventing the respondent, as long as he is a shareholder of the Bank from taking copies of and extracts from the register.

This suit is in truth in its nature, though not in its form, somewhat of the character of an application for a writ of *mandamus*, and the principles regulating the issue of that prerogative writ should, their Lordships think, apply to a great extent to the granting of the relief prayed for in such a suit as this. One of these principles is this, that the writ will not be allowed to issue unless the applicant shows clearly that he has the specific legal

right to enforce which he asks for the interference of the Court, that he has claimed to exercise that right and none other, and that his claim has been refused. Nothing less, therefore, than the absolute right claimed by the respondent in the correspondence above referred to could justify the decree appealed from in its present wide and unrestricted form. Now by S. 231 of the above-mentioned Indian Act of 1865 and S. 256 of the above-mentioned Act of 1882, the appellant Bank is expressly exempted from the operation of each of those statutes.

There is no statute conferring on the members of this corporation a right to inspect, copy, or take extracts from, the register of its shareholders or any other document belonging to it. The only right the respondent can have, therefore, against the Bank in reference to such matters, is that which at common law belongs to every member of a corporation. Their Lordships have been referred to several authorities [1] in which the nature, extent, and measure of this right is explained and defined. The learned Judges in the Bombay Court of appeal have referred to others. The result of the authorities is summed up, in their Lordship's view correctly, in "Taylor on Evidence," Vol. 2, par. 1495 (10th edition, 1906) in the words following:—

"On the application of a member, the King's Bench Division will, in general, grant a rule for a *limited inspection* of the documents of the corporation, if it be shown that such inspection is requisite with reference either to an action then instituted or at least to some specific dispute or question pending in which the applicant is interested; but, even in this case, the inspection will be granted to such an extent only as may be necessary for the particular occasion. The rule was formerly sometimes laid down more broadly, and the language ascribed to the Court in one or two cases might almost lead to the inference that members of a corporation have an absolute right, whenever they think fit, to inspect all papers belonging to the aggregate body. But any such doctrine is now exploded; and the privilege of inspection is now confined to cases where the member of the corporation has in view some definite right or object of his own, and to those documents which would tend to illustrate such right or object."

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1. *Rex v. Wills and Berks Canal Company,* (1835) 3 A. & E. 477, *Reg. v. Lewisham Union* [1897] 1 Q. B. 498.

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The strictness with which these limitations on the general and unqualified right of inspection are insisted on may be aptly illustrated by the case of *Rex* v. *Merchant Tailors' Co.*[1] In that case certain members of a corporation claimed the right to inspect all the documents belonging to that body on the grounds (1) that they had heard and believed the revenues of the corporation were misapplied through the malpractices of those who managed the corporation's affairs ; (2) that the fines for admitting freemen and liverymen to the corporation had been unnecessarily and improperly raised ; (3) that lavish expenditure had taken place (in some instances to the applicant's own knowledge) without the consent of the majority of the members of the corporation, (4) that clerk of the corporation had, as the applicants had heard and believed, recently misappropriated funds of the company to a large amount, but no accounts or information had been laid before the freemen or liverymen by which they could have ascertained the amount of the defalcations ; and that they (the applicants) could not ascertain, unless they were allowed to look at the documents mentioned, whether the corporate funds had been properly applied and accounted for or not.

Every member of the corporation in this case obviously had an interest in each of the matters mentioned, but none of the applicants had in any of them any special interest different from that of his fellow members, nor had they any definite purpose, or object, in obtaining the inspection asked for other than (in the words of *Littledale* J.) to see "if by possibility the company's affairs may be better administered than they think they are at present." And the writ of *mandamus* was accordingly refused in this case.

At the trial no witness other than the respondent was produced, and he was only tendered for cross-examination. He stated that he had heard through brokers that the Bank had advanced six lacs of rupees to three persons whom he named ; that at elections the directors transferred shares to nominees who voted for them (a practice not in itself illegal) ; that there were now only seven directors, instead of the maximum nine, that he intended to bring in two respectable people, and that he had in

1. (1831) 2 B & Ad. 115.

the correspondence given his reasons for asking *inspection*. It is clear on this evidence that the respondent had no special interest in any of the matters he complained of, or any interest other than, or different from, that of each member of the corporation, and that he had no definite right or object of his own to aid or serve in asking for inspection of the register, or right or object which the register would illustrate; but that, on the contrary, his object was similar to that of the applicants in *Rex* v. *The Merchant Tailors' Co.*[2] namely, to obtain the inspection in order to communicate with the shareholders with the view of securing their help in bringing about an improvement in the administration of the corporation's affairs.

Their Lordships think that, on this point, the case is covered by the authority of *Rex.* v. *The Merchant Tailors' Co.*[1] that the respondent is not in law entitled to the extended right to which the decree declares him to be entitled, that the limited and qualified right contended for at the trial was never put forward, or insisted on, before action brought, or any claim based upon it ever refused, and they are, therefore, of opinion that the decree appealed from is erroneous and should be reversed with costs, and the Judgment and Order of Mr. Justice *Scott* restored. They will humbly advise His Majesty accordingly. The respondent must pay the costs of this appeal.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE CALCUTTA HIGH COURT :]

Present :—Lord Macnaghten, Lord James of Hereford, Lord Atkinson, Sir Andrew Scoble and Sir Arthur Wilson.

Debendra Nath Dutt .. Appellant.*

v.

The Administrator General of Bengal and others .. Respondents.

Administration—Administration bond—Administrator, fraud of—Sureties neither parties to nor cognizant of fraud—Misappropriation—Discovery of fraud—Cancellation and fresh grant of letters of administration—Assignment of bond to new administrator—Sureties, liability of.

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* 1908 May 12th & June 3rd.

1 (1831) 2 B. & Ad. 115.

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The appellant was one of two sureties in a bond conditioned for the due administration by Cowie of the estate of Craster, who died in England in August 1898 leaving a will which was duly proved there in the following month of October. Part of the deceased's estate consisted of shares in the Bank of Bengal and other Indian assets. On July 29th, 1902, Cowie obtained an order for the grant of letters of administration to himself as attorney for a fictitious person represented by him to be the only son and sole next-of kin of the deceased, who had, as he pretended, died intestate. The letters of administration were issued on the 15th of August 1902, on the production of a bond in the usual form executed by Cowie and two sureties, who received a small payment for their services, but were not themselves parties to the fraud or cognizant of it. By those means Cowie obtained possession of the Bank shares, sold them in the market, and converted the proceeds to his own use. The fraud was subsequently discovered. The grant of administration in his favour was cancelled and in May 1904 letters of administration with a copy of the will annexed were granted to the Administrator-General of Bengal. The bond of the 15th August 1902 was then assigned to the Administrator-General, and he brought the present suit against Cowie and Cowie's sureties.

Held, that so long as the letters of administration granted to Cowie remained unrevoked, Cowie, though a rogue and imposter, was to all intents and purposes administrator and for his acts and defaults as administrator the appellant and his co-surety became and must remain responsible; and that the decree under appeal confirming a decree of the first Court the result of which so far as regards the sureties, was that they were ordered to pay to the administrator a sum equal to the amount of the proceeds of the Bank shares misappropriated by Cowie together with interest and costs, was perfectly right.

Appeal from a decree of the Calcutta High Court, in its Appellate Jurisdiction affirming a decree[1] of the same High Court, in its Ordinary Original Civil Jurisdiction.

The question raised on the appeal was whether on the malversation of the estate of a deceased person by the administrator appointed by the Court, the *prima facie* liability of sureties under an administration bond given to the Court fails to arise or attach, because the administrator not only committed the acts of malversation in question, but also obtained the grant of the letters of administration to him by means of such a course of fraud that the letters were liable to be and were afterwards avoided.

In August, 1898, one Edmund Craster Craster (hereinafter called the deceased) died in England, leaving in addition to property in England assets of considerable value in India. The

1. *Debendra Nath Dutt and Banku Behary Banerjee v. Administrator-General of Bengal* (1906) I. L. R. 33 C. 713.

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bulk of these assets consisted of 86½ shares in the Bank of Bengal. The deceased left a will of which probate was granted in England on October 27, 1898, to Thomas Henry Craster and Robert Conway Dobbs. He left three sons and two daughters but none of such sons were named Henry Craster Craster as was subsequently falsely represented as hereinafter mentioned.

On July 29, 1902, one Ernest Hardwicke Cowie, who was then a member of the firm of Sanderson and Co., the solicitors of the Government of India, in Calcutta, presented a petition to the High Court, for the grant to himself of letters of administration of the estate of the deceased as the constituted attorney of an alleged person Henry Craster Craster, and in such petition falsely stated that the deceased had died intestate and had left the said Henry Craster Craster, his only son and next-of-kin him surviving. The petition was supported by a false declaration by Earnest Hardwicke Cowie and also by a false affidavit by him, and he had annexed thereto an alleged power of attorney whereby the said alleged Henry Craster Craster purported to empower Ernest Hardwicke Cowie to make the application. There was no such person as Henry Craster Craster and the power of attorney was a forgery.

Upon the presentation of the petition an Order of the Court was made in due course for the grant of letters of administration of the estate of the deceased to Ernest Hardwicke Cowie for the use and benefit of the said Henry Craster Craster, who then procured, as required by the Indian Succession Act and the practice of the Court, two sureties, namely, the appellant, Debendra Nath Dutt, and one Banku Behary Bannerjee, to enter with him into a joint and several bond dated the 15th day of August, 1902, and conditioned as follows in a penalty of Rs. 1,31,922-4-0:—

THE condition of the above written obligation is such, that if the above bounden Ernest Hardwicke Cowie, the administrator of the property and credits of Edmund Craster Craster deceased, do make or cause to be made a full and true inventory of all the estate of the said deceased, which has or shall come to the hands, possession, or knowledge of him the said Ernest Hardwicke Cowie or into the hands or possession of any other

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person or persons for him, and the same so made do exhibit or cause to be exhibited into the Registry of the said High Court, at or before the fifteenth day of February next ensuing, or within such further time as the Court may from time to time appoint: And the same estate, and all other the estate of the said deceased at the time of his death, which, at any time after, shall come to the hands or possession of the said Ernest Hardwicke Cowie, or or any other person or persons for him do administer according to law: And further do make, or cause to be made, a true and just account of his said administration at or before the fifteenth day of August which will be in the year of our Lord one thousand nine hundred and three, or within such further time as the Court may from time to time appoint: And all the rest and residue of the said estate which shall be found remaining upon the said administration account, the same being first examined and allowed of by the said High Court of Judicature, shall deliver and pay unto such person or persons respectively as shall be lawfully entitled to such residue: And if it shall hereafter appear that any last will and testament was made by the said deceased, and the executor or executors therein named do exhibit the same into the said Court, making request to have it allowed and approved accordingly *and* if the above bounden Ernest Hardwicke Cowie being thereunto required, do render and deliver the letters of administration to him granted (approbation of such testament being first had and made) in the said Court, then this obligation to be void and of no effect, else to remain in full force and virtue.

On the record there was another copy of the bond without the word "and" put in italics above.

The sureties appeared to have each received a bonus, in the case of one Rs. 300, and in the other case Rs. 200, for executing the bond. Upon the execution and delivery to the Court of the bond, the grant of the letters of administration was issued to Ernest Hardwicke Cowie, who shortly afterwards sold the whole of the 86½ bank shares for an aggregate sum of Rs. 1,05,595, or thereabouts, and misappropriated and converted to his own use the proceeds of such sale.

Towards the end of the year 1903 and the beginning of the year 1904 discovery was gradually made of the fraud that had

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been perpetrated by Ernest Hardwicke Cowie. On April 28, 1904, the grant to Ernest Hardwicke Cowie was annulled, and on May 10, 1904, fresh letters of administration were granted to the respondent, the Administrator-General of Bengal, with a copy annexed of the will of the deceased. On May 26, 1904, an order of the Court was made that the bond of the 15th of August, 1902, should be assigned to the Administrator-General of Bengal, and the same was duly assigned to him by a deed dated the 10th day of June, 1904.

On June 21, 1904, the Administrator-General of Bengal filed his plaint in the present suit in the High Court of Judicature at Fort William in Bengal against Ernest Hardwicke Cowie and the two sureties, the appellant Debendra Nath Dutt and Banku Behary Bannerjee, and thereby sought to recover from Ernest Hardwicke Cowie a balance or sum of Rs. 1,39,901-13-0, as shown by an account thereto annexed, which balance or sum mainly arose from a sum of Rs. 1,07,260-0-0 estimated as the then market value of the 86½ bank shares, and from a further sum in respect of the dividends thereon, but also included a certain cash balance not collected by Ernest Hardwicke Cowie. The plaintiff-respondent also sought to recover from the appellant and Banku Behary Bannerjee the full amount of the penalty named in the above mentioned bond, namely the sum of Rs. 1,31,922-4-0.

The first defendant Ernest Hardwicke Cowie did not appear in the suit, and the main defence of the two surety defendants was that the grant of the letters of administration to Ernest Hardwicke Cowie having been obtained by misrepresentation and fraud and therefore being void, the bond was likewise void and unenforceable, both as itself induced and obtained by fraud, and also as entered into under a mutual mistake as to the circumstances and the subject matter of the contract, and also as founded on a misrepresentation made to the surety-defendants by the Court, namely that Henry Craster Craster really existed and was the only son and next-of-kin of the deceased and that the facts have been well proved to the Court.

The suit was heard before *Sale* J., and on March 29, 1905, the Court made a decree whereby Ernest Hardwicke Cowie was ordered to pay to the plaintiff-respondent the sum of Rs. 25,100, with interest thereon at the rate of 6 per cent. per annum, and all

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the defendants were ordered to pay to the plaintiff-respondent the sum of Rs. 1,07,159-7-7, with interest thereon at the rate aforesaid from the date thereof until realisation. The first amount represented a sum in the hands of Ernest Hardwicke Cowie for which he was clearly liable to the estate of the deceased, but as regards which the Court held that there was not sufficient evidence against the sureties to make them liable. The second amount, for which all the defendants were found liable, was arrived at by debiting them with amounts actually realised by the sale of the bank shares, and with certain dividends thereon after making certain proper deductions or allowances. For the judgment of *Sale* J. see *Debendra Nath Dutt* and *Banku Behary Bannerjee* v. *Administrator General of Bengal.*[1]

Appeals were filed against that decree both by the appellant and Banku Behary Bannerjee. On the first of those appeals objections were lodged by the plaintiff-respondent to the judgment of Mr. Justice *Sale* so far as it disallowed the sum of Rs. 25,100, or thereabouts against the appellant and Banku Behary Bannerjee. The appeals and the cross-objections were heard before a Court consisting of the Chief Justice Sir F. W. *Maclean* and Justices *Harrington*, *Stephen*, *Mitra* and *Geidt*. The majority of the Court, namely *Maclean*, C.J., and *Mitra* and *Geidt*, JJ., were of opinion that the appeals should be dismissed and the minority, namely *Harrington* and *Stephen*, JJ., dissented and were in favour of allowing the appeals. In the result on March 23, 1906, a decree was made dismissing the appeal and disallowing the objections. The judgments of the learned judges are reported in *Debendra Nath Dutt and Banku Behary Bannerjee* v. *Administrator-General of Bengal*[1].

Against that decree the appellant, Debendra Nath Dutt, appealed to His Majesty in Council.

Lord Robert Cecil, K.C., and *Boydell Houghton* for appellant.

Simson, K. C., and *C. H. Sargant* for respondent.

Lord Robert Cecil, K.C., and *Mr. Boydell Houghton*:—The decased left a will, of which probate had been obtained by two of the executors. Consequently the adminstration granted to Cowie was in itself a nullity and the grant of letters of administration to Cowie was wholly void—*Ellis* v. *Ellis*[2]. The letters of

1. (1906) I. L. R. 33 C. 713.
2. (1905) 1 Ch. 613.

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administration being void the bond was also void; the appointment of Cowie was void, and he was not the administrator of the estate of the deceased. The sureties are not liable, where the administrator had never been duly appointed :—*Holland* v. *Lea*[1]. The appellant is not estopped by the recitals of the bond from showting that Cowie's appointment was void. Where the appointment is not complete, the sureties are not responsible in respect of moneys collected without legal authority—*Kepp* v. *Wiggett.*[2] Here Cowie, whose appointment was wholly void, had no authority to call in the estate of the deceased, and the appellant is not responsible for any money so collected by Cowie.

The bond states upon its face that Cowie is the administrator of the property and effects of the deceased and was entered into upon the basis that Cowie was, as the appellant and the obligee of the bond believed, the administrator to the estate of the deceased whereas the letters of administration granted to him were in fact void. Both the appellant and the obligee of the bond were under a mistake as to a matter of fact essential to the bond. The bond is, therefore, void—Indian Contract Act (IX of 1872) S. 20. The bond is also void owing to its having been entered into by the Court and the sureties under a mutual mistake of fact, viz :—the authority of Cowie as attorney of the next-of-kin to apply for and receive a grant of letters of administration as a person so authorised by the next of-kin and in fact administrator, and did not warrant due administration by a person not so authorised. The Court by granting letters of administration to Cowie represented to the sureties that he was the duly authorised attorney of the next-of-kin of the deceased and the person entitled to have such letters of administration granted to him and was the administrator. The appellant relied upon such representation and entered into the bond on that basis. Such representation was contrary to fact and the appellant is not liable under a bond entered into on that basis.

Simson, K. C., and *C. H. Sargant* referred to Ss. 20 and 21 of the Indian Contract Act and contended that the subject-matter of the transaction in connection with the bond was in fact the

1. (1854) 9 Ex. 430. 2. (1850) 10 Q. B. 35.

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due administration of the estate of the deceased by Cowie. Administration has in fact taken place in this case. Notwithstanding that letters of administration ultimately proved void *ab initio*, the fact of an administration having taken place is not destroyed, nor is every transaction that has taken place by virtue of such letters necessarily avoided, particularly in view of S. 242 of the Indian Succession Act (X of 1865). The liability of the sureties did not depend upon the validity or invalidity of the grant to Cowie. The sureties made themselves responsible for the due administration by Cowie of the estate of the deceased. He did act under the grant, and the validity or invalidity of the grant cannot affect their liability. It is contended by the other side that the execution of the bond by the sureties was induced by misrepresentation of the Court in the grant of letters of administration. But as a matter of fact the issue of such grant was necessarily subject to and contingent on the execution of the bond and subsequent thereto—Indian Succession Act (X of 1865), S. 256. The Court in requiring a bond from the administrator and his sureties contemplates not only the effect of mal-administration, but also the chances of the grant being subsequently declared either void or voidable. It is submitted that neither the invalidity of the grant nor the mistake of the Court in accepting the bond is sufficient to discharge the sureties. The language of the last clause of the bond expressly contemplates an event, namely, the discovery of a will of the deceased, which would necessarily make the letters of administration void, and provides in that event for additional and not substitutional obligations on the sureties. The event, which was contemplated, did actually happen. So long as the grant is not revoked it is a good grant. The bond was given as sureties for *de facto* administrator and the sureties are liable for the due administration by him. Cowie broke the condition of the bond by failing to administer the estate of the deceased according to law and thereby caused a loss to the estate. The sureties are liable for such a loss.

It is contended by the other side that the bond is void owing to its having been entered into by the Court and the sureties under a mutual mistake, *viz.*, the authority of Cowie as attorney of the next-of-kin to apply for and receive a grant. But a

1 (1868) 17 W. R. 189.

misstatement in the recital of an administration bond does not release the sureties—*Lester v. Gooch.*[1]

In *Kepp* v. *Wiggett*[1], relied upon by the other side, the Collector was acting outside his office. But here that is not the case as already pointed out.

Lord Robert Cecil, K. C., in reply:—The whole point is whether it is a guarantee for *bona fide* acts of Cowie as administrator or for any acts of his whether he was administrator or not. If the guarantee was that he would discharge his duty as administrator, the question arises whether he was administrator. The grant of letters of administration to Cowie being void *ab initio*, he was not administrator at any time. That being so, there was no guarantee.

Lester v. *Gooch*[2] does not apply here. That case refers to a mis-recital. But here the case is not that of mis-recital. Cowie was, in fact, not the attorney of the next-of-kin.

Reference was made to Ss. 234 and 262 of the Indian Succession Act (X of 1865).

The judgment of their Lordships was delivered by

Lord Macnaghten.—This is an appeal from the High Court of Judicature at Fort William in Bengal.

The appellant, Debendra Nath Dutt, was one of two sureties in a bond conditioned for the due administration by Ernest Hardwicke Cowie, a solicitor in Calcutta, of the estate of a retired Indian civil servant named Craster. Mr. Craster died in England in August 1898, leaving a will which was duly proved here in the following month of October. Part of the deceased's estate consisted of shares in the Bank of Bengal and other Indian assets. The Indian assets escaped the notice of the executors and remained unclaimed and outstanding. On the 29th of July, 1902, Cowie, who is stated in the printed cases to have been one of the solicitors to the Government, and who certainly was then in good credit, obtained an order for the grant of letters of administration to himself as attorney for a fictitious person represented by him to be the only son and sole next-of-kin of the deceased, who had, as he pretended, died intestate. The letters of administration were issued on the 15th of August 1902, on the

1. (1850) 10 C. B. 85.

2. (1868) 17 W. R. 139.

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production of a bond in the usual form executed by Cowie and the two sureties, who received a small payment for their services, but were not themselves parties to the fraud or cognizant of it. By these means Cowie obtained possession of the bank shares, sold them in the market, and converted the proceeds to his own use. The fraud was not discovered till the end of 1903 or the beginning of 1904. Cowie then absconded. He was apprehended, tried, and convicted. The grant of administration in his favour was cancelled, and in May 1904 letters of administration with a copy of the will annexed were granted to the Administrator-General of Bengal. The bond of the 15th of August 1902 was then assigned to the Administrator-General, and he brought this suit against Cowie and Cowie's sureties. Cowie made no defence. The suit was heard by *Sale* J. That learned Judge pronounced a decree in favour of the Administrator-General, the result of which, so far as regards the sureties, was that they were ordered to pay to the Administrator a sum equal to the amount of the proceeds of the bank shares misappropriated by Cowie together with interest and costs. Both the sureties appealed to the High Court. But that Court in its appellate jurisdiction by a majority affirmed the order of *Sale* J. and dismissed the appeal with costs,

The case of the appellant Dutt, who alone has appealed to His Majesty, as presented to this Board, was that the letters of administration granted to Cowie, having been annulled by the Court on the ground of fraud, must be regarded as a mere nullity from the beginning; that Cowie, therefore, never was administrator and that the bond, so far as the sureties were concerned was void and of no effect; for the sureties undertook to be responsible for a real administrator, not for a person assuming to act in a capacity which he never possessed and which the Court could not have conferred upon him. The case was argued very ably by the learned Counsel for the appellant who said everything that could be said on his behalf. But there is really no substance in the appellant's contention. So long as the letters of administration granted to Cowie remained unrevoked, Cowie although a rogue and an impostor, was to all intents and purposes administrator. He, and he alone, represented the deceased in India. His receipts were valid discharges

for all moneys received by him as administrator. As administrator he collected the assets belonging to the deceased in India, and he misappropriated the assets which he so collected. For his acts and defaults as administrator the appellant and his co-surety became and must remain responsible.

Their Lordships are, therefore, of opinion that *Maclean* C. J. and the learned Judges who concurred with him were perfectly right, and they will humbly advise His Majesty that the appeal must be dismissed.

The appellant will pay the costs of the appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White, *Kt.*, Chief Justice, and Mr. Justice Boddam.

C. R. Srinivasa Chariar .. .. Plaintiff*
v. (*Appellant*).
The Municipal Council, Kumbakonam .. Defendant (*Respondent*).

Srinivasa Chariar v. Kumbakonam Municipal Council.

Madras Acts—District Municipalities Act, Ss. 85 and 88—Registration Court—Obliteration of number on one axle and painting it on another—Illegal collection of toll—Municipality, not liable.

Removing the registration number from one axle and affixing it on another is not an offence within the meaning of Ss. 85 and 88 of the District Municipalities Act, unless it be that such affixing is contrary to any bye-law of the Municipality or a direction given by the Municipality under S. 85. Where the number was so removed from one axle and affixed to another axle of a cart by the owner, the Municipality is not liable in respect of tolls illegally collected by the toll contractor, but is only liable in respect of any license fee collected by itself.

Appeal under S. 15 of the Letters Patent from the judgment of Mr. Justice Benson in C. R. P. No. 17 of 1907 presented against the decree of the Court of the District Munsif of Kumbakonam in S. C. S. No. 2001 of 1906.

A. S. Cowdell and *S. Krishnamachariar* for appellant.

The Advocate General (*P.S. Sivaswami Aiyar*) for respondent.

The Court delivered the following

JUDGMENT:—In dismissing the revision petition the

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* L. P. A. No. 59 of 1907. 27th March 1908.

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learned judge, who heard the petition states that in course of repairs to the cart the number was obliterated.

If this had been so, we should have agreed with the learned judge that the plaintiff had failed to keep affixed to his cart within the meaning of S. 88 of Act IV of 1884 the registration number required by S. 85 of the Act.

But there is no evidence that the number had become obliterated. According to the facts as stated by the Advocate-General on behalf of the Municipality the plaintiff removed the portion of the axle on which the registration number had been painted from the damaged wheel and affixed it to the repaired axle. We are of opinion that when the registration number has been affixed in this manner the cart bears the registration number for the purposes of S. 85 and the registration number is kept affixed for the purposes of S. 88 unless such affixing is contrary to any bye-law of the Municipality or a direction given by the Municipality under S. 85.

The Advocate-General has been unable to call our attention to any such direction or bye-law.

It seems to us, however, that as regards the tolls paid the judgment of the Munsif must be upheld for the reasons stated by him; so far as the tolls paid by the plaintiff are concerned the Municipality is not liable.

As regards the license fee, the Advocate-General has very properly conceded that the Municipality are not entitled to charge this fee twice over.

There is some evidence that the Municipality resolved to return this fee if the plaintiff applied for it, but there is no evidence that the plaintiff received any notice to this effect or that the Municipality tendered the amount to the plaintiff. In his judgment, the Munsif says: "The Municipality now offer to repay the plaintiff the license fee alone."

We think the plaintiff is entitled to a decree against the Municipality for the amount of the 2nd license fee and we give him a decree for this.

The parties will pay and receive proportionate costs of the petition and of this appeal.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE CHIEF COURT OF THE PUNJAB.]

Present :—Lord Robertson, Lord Atkinson, Lord Collins, Sir Andrew Scoble and Sir Arthur Wilson.

Atar Singh and others .. .. Appellants.*

v.

Thakar Singh .. .. .. Respondent.

Hindu Law—Evidence—Deed of sale of lands, suit to set aside—Ancestral lands—Onus—Proof—Conjectures.

The plaintiffs, who were minors, brought the suit to set aside a deed of sale made by their father Dayal Singh to the appellants and certain other persons as purchasers, on the ground that the lands, the subject-matter of the sale, were, in the view of the Hindu Law, ancestral, and that the sale was not necessary, and was for a fictitious consideration and in fraud of the rights of the plaintiff's father Dayal Singh, as next heir and reversioner on the death of the widow of Dhanna Singh, the deceased owner. The only question in dispute on the appeal was whether the lands were ancestral. There was really no evidence that the lands in question came to Dhanna Singh by descent at all. There was evidence that he acquired some lands in the district by purchase from the owners and there was a probability that he acquired others by the abandonment of other persons who might have been collateral, and in that way might have become possessed of lands which, by the custom of the Punjab, would be regarded as ancestral. But there was no evidence whatever defining the boundaries of those portions of land respectively.

Held, that it was through their father, as heirs of Dhanna Singh, that the plaintiffs claimed, and unless the lands came to Dhanna Singh by descent from a lineal male ancestor in the male line, through whom the plaintiffs also in like manner claimed, they were not deemed ancestral in Hindu Law.

Held, also, that when the onus lay, as it did in the present case, on the plaintiffs in seeking to set aside a solemn deed executed by their father, conjectures could not be accepted as a substitute for proof and that the plaintiffs failed to prove their case that the lands were ancestral.

Appeal from a decree of the Chief Court of the Punjab varying a decree of the Court of the District Judge of Amritsar.

The principal question involved in the appeal was whether and to what extent a deed of sale executed by Dayal Singh, the respondent's father, on May 7, 1894, was binding on the respondent.

The property in suit consisted of land and a house situate in the village of Sungbala and seven houses situate in the city of

* 17th June and 16th July, 1908.

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Amritsar. They were at one time the property of Sirdar Dhanna Singh. On his death they passed to his widows. On April 13, 1879, one of the widows, Rajind Kaur, made a gift of certain other properties to her daughter Khem Kaur and, on October 15, 1891, she made a gift of the properties in suit to Gurdit Singh, the son of Khem Kaur.

Dayal Singh was the next reversioner to Dhanna Singh's estate on the death of Rajind Kaur. He had no money and was unable to take any action to establish his rights in connection with the above and other alienations of Dhanna Singh's estate made by the widows. After various efforts ending in failure, to obtain funds by sharing the property with the lender, he on October 27, 1891, entered into an agreement with the appellants, Man Singh, Kharak Singh and Harnam Singh, by which he agreed to give them "6/16ths share of each and every alienated property for cancellation of the alienations of which a decree may be passed by the Courts concerned, in lieu of the expenses which may be incurred by the said persons in Courts, the help which they may give and the labour and the time which they may expend in the prosecution of the case relating to the said alienations."

The expenses to be paid were not to include pleader's fees, as to which Dayal Singh on the same date entered into a separate agreement with the appellant Atar Singh, by which he contracted to give Atar Singh a 3/16th share in each property recovered by the exertions of the pleader in lieu of any payment for his services.

In pursuance of those two agreements, a suit was at once brought against Gurdit Singh, and on April 26, 1893, a final decree was made by the Chief Court of the Punjab declaring that the deed of gift dated the 15th October, 1891, was inoperative after the death of Rajind Kaur.

Rajind Kaur died on April 27, 1894, and on May 7, 1894, Dayal Singh executed a deed of sale conveying a 37/64th share in the properties in suit, to the appellants and certain other members of their family.

On October 16, 1897, Thakar Singh and Kehr Singh, the minor sons of Dayal Singh, by their mother, acting as next friend,

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instituted the present suit in the Court of the District Judge of Amritsar against the appellants and Dayal Singh (defendant No. 8). The plaint alleged that the sale of May 7, 1894, was for a fictitious price of Rs. 30,000 without any legal necessity and in fraud of the plaintiffs' rights as reversioners; that the property purporting to be sold was ancestral property; and that Dayal Singh had no power to sell the same as he had no legal necessity. The plaintiffs prayed that the sale be declared not binding on the reversionary interest of the plaintiffs. Kehr Singh died *pendente lite.* Dayal Singh, impleaded as a defendant in his written statement, supported the plaintiffs' case, and alleged that he had received no consideration, and had executed the deed of sale when drunk.

The appellants, the purchasers, pleaded *inter alia* that the property in suit was not ancestral, that Dayal Singh had full power of alienation and that the alienation was for necessity.

The District Judge fixed five issues, of which it is necessary to mention only the following two for the purpose of this report:—

" 1. Was the property in dispute the ancestral property of " defendant No. 8 and of plaintiffs?

" 2. If it was, was the alienation for full consideration a " legal necessity, and are plaintiffs bound by the agreement of " the 27th October 1891, and is the same for the benefit of defen- " dant No. 8 and of plaintiffs?"

The District Judge delivered his judgment on March 30, 1899. He found that the property in suit both in Sungbala and Amritsar was not ancestral estate, but fixed a sum of money as " the actual legal consideration constituting necessity", it the property were to be found ancestral. In the result he made a decree dismissing the suit. The part of the judgment of the District judge containing his conclusion and reasoning on the first issue, with which their Lordship's agreed, was as follows:—

" A very difficult task was laid on plaintiff to perform, viz., to prove positively that the land in suit was ancestral. The plaintiff had conjectures to help him, as I have already described,

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and very reasonable conjectures, too—but, after all, only conjectures—whereas absolute certainty was demanded. The nature of the Sirdar's rights in the village was decidedly peculiar; *prima facie*, they were acquired rights, that is, by self-acquisition; for all individual rights were lost by the confiscation by the Rikh Raj, and had it not been for the Sirdar, the lands then taken would have still formed part of Rakh Shikarjah, as the other lands of other villages then included. Under these circumstances I have come to the conclusion that plaintiff has failed to establish affirmatively that the land in suit is ancestral. I have come to this conclusion the more readily, as the Sirdar had 1,197 ghumaos of land, and all the land has been sold by his widows, so that what the Sirdar got from the common ancestor, Shaur Singh, and from his collaterals, may well be regarded as included in that sold by the widows, and that the land now in dispute is self-acquired. It is said, with some show of reason, that the original land of the old village of Tung is that included in Chhumbwala village where all the Tung Jats have proprietary rights, so it might reasonably be supposed that the Sirdar's ancestral lands were also in the lands of this village, and, if so, no part of the lands of this village is in dispute.

" I might record here that the defendant's counsel referred to statements made by Dayal Singh's father, Chanda Singh or Jhanda Singh, in the litigation of 1864-65, before Agha Kalb Abid Khan, Extra Assistant Commissioner, to the effect that Sirdar Dhanna Singh had acquired the lands in Sungbala, and that this effectually concluded Dyal Singh and his son, Shakar Singh, from denying the fact contained in the statement. I place no weight to this, as I consider that Chanda Singh did not contend to differentiate between ancestral and self-acquired lands, but merely described what had taken place, *viz.*, that the Sirdar got back the lands that had been at one time taken by Maharaja Kharak Singh for his great hunting ground."

Against that decree the respondent appealed to the Chief Court of the Punjab, and on May 26, 1903, the Chief Court delivered its judgment and decided that the property in Sungbala was ancestral and that in Amritsar was not ancestral, and that the sum of Rs. 5,480-4-0 was properly chargeable as necessity, but of that sum Rs. 3,500 had been received by the appellants.

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In accordance with those findings a decree was made declaring that the respondent was not affected by the deed of sale dated May 7, 1894, except to the extent of Rs. 1,980, which amount remained charged on the land. The following is the material part of the judgment.

"We therefore proceed at once to what is the main point in the case and what has been the crucial point throughout, *i.e.*, is the property in suit 'ancestral' in whole or in part in the sense in which that term is understood under the customary law? Ancestral property, for the purposes of this suit, means property which was held by an ancestor who is the common ancestor of the parties. In this case, therefore, it would mean property held by any direct ancestor of Dyal Singh and of Dhanna Singh.

"Extract from the remarks recorded on the pedigree tables of Mauza Sungbala at the Settlement records of 1865 and 1892-93 are on the record and are printed at pages 14 and 15 of the paper book.

"There appears to be no doubt that the village was originally founded by a Tung Jat who was the common ancestor of the defendants, Dayal Singh and Dhanna Singh. In the pedigree table prepared at settlement, Dayal Singh and Dhanna Singh are shown as descended from one Harji. No doubt in the Sikh times the stronger members of a family got more than their shares and we find from the remarks recorded in 1892-93 that the entire land had practically come into the hands of Dhanna Singh. Lands given up by other co-sharers and coming to Dhanna Singh in virtue of his relationship and of the fact that the land had been held by a common ancestor of the absconder and Dhanna Singh would clearly be held to be ancestral. Some portions may have been derived from other proprietors of their holdings only by purchase or simple acquisition in their absence, but the main portions would appear to have been left by the other Tung relatives to come into Dhanna Singh's hands. It is noted in the pedigree table that 'most of the co-sharers of the village, being in straitened circumstances, absconded' or absented themselves. Out of the proprietary body Sirdar Dhanna Singh 'alone remained in possession of the entire land.' It would appear, therefore, clear that the village had been acquired practically in its entirety

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by Dhanna Siugh in consequence of the abandonment of his relatives and collaterals. In regard to such land it has been laid down in Punjab Record No. 31 of 1894 that it should be considered ancestral. At page 88 of that judgment it is remarked : 'Considering that this was a portion of the family ancestral holding, and fell to Sham Singh owing to its abandonment by a near relative, we think that this portion of the estate should be held to be governed as regards alienations by the same rule as that which applies to that part of the estate which is admittedly ancestral. We think that this particular land is not removed from the category of ancestral property, merely because it came to Sham Singh owing to the abandonment thereof by a near relative rather than by simple inheritance. These principles are in no way traversed in the judgment in Punjab Record No. 81 of 1901 which is by a single Judge, the circumstances in that case being quite different from those in this'. We think, therefore, that it must be presumed that the land in Dhanna Singh's hands before the village was evacuated in order that Kanwar Nan Nikal Singh might make a garden of it, must be considered to have been then ancestral. It is impossible to differentiate between the portions which came from relatives and co-sharers and the portions which may have, in some instances, been purchased.

"It appears, however, that Kanwar Nan Nihal Singh about fifty years ago" (*i.e.*, about 1842) "caused the village to be evacuated, for he intended planting a garden there." These are the words on this point in the pedigree table 1892-93. It does not appear how far this intention was ever carried out or whether the depopulation and evacuation went beyond the village site. It appears that when Sirdar Nan Nihal Singh wished to start his garden Sirdar Dhanna Singh started another village site—abadi—on the lands of the hunting ground known as Shikargah and that abadi remained as the village-site of Sungbala—the old site, which had been destroyed or depopulated to make room for the garden being included as Nazul property in Amritsar. It does not appear whether Sirdar Nan Nihal Singh ever intended to, or ever did, take up the cultivated lands of Sungbala which would have made a very large garden. The word used in connection with the garden is *tamir* which sugggests the idea that a walled and enclosed garden was intended. The idea was not carried

out, but the new abadi for Sungbala which Dhanna Singh had started remained as the abadi of Sungbala and the old one was incorporated in Amritsar. It does not appear whether or not Dhanna Sigh was ever dispossessed of any part of the culturable lands; if he was, apparently, they were almost immediately restored intact. Some neighbouring villages were destroyed to make the hunting ground of Maharaja Kharak Singh, but this was not the case with Sungbala, and we are quite unable to find from the record that there was any such confiscation and break of ownership in regard to Sungbala as would bring the case within the puview of the ruling in *Ram Nundan Singh* v. *Janki Kour.*[1] Even if the land was taken up by Sirdar Nan Nihal Singh for a short period, which is by no means established, it appears to have been restored intact, and there was no such break of continuity as to deprive the property of its ancestral character. We hold, therefore, on a full consideration of all the facts disclosed by the reeord that that part of the property must be classed as ancestral."

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The appellants, therefore, appealed to His Majesty in Council. But in view of the concurrent finding by the Court in India that the houses in Amritsar were not ancestral, the appeal was confined to the consideration of the question whether the land and house in the village of Sungbala were ancestral.

DeGruyther, K. C., for the appellants, referred to Mayne on Hindu Law and Usage (7th ed.) p. 343; *Sonu* v. *Loku*[2], and *Haidar Khan* v. *Johan Khan*[3], and contended that the finding of the Chief Court that the property situate in Sungbala was ancestral was erroneous both in fact and law, and that the plaintiffs, as found by the District Judge, failed to prove their allegation.

The respondent did not appear.

The judgment of their Lordships was delivered by

Lord Collins.—This is an appeal from a decree of the Chief Court of Punjab varying a decree of the District Judge of Amritsar. The suit was brought by Thakur Singh and his brother Kehr Singh, minors, by their mother acting as next friend, to set aside a deed of sale made on the 7th May, 1894, by their father Dayal Singh

1 (1902) I. L. R. 29 C. 828. (P.C.) 2. (1881) P. R. 2.
3. (1902) P. R. 178.

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to the appellants and certain other persons as purchasers, on the ground that the lands, the subject-matter of the sales, were in the view of the Hindu Law, ancestral, and that the sale was not necessary, and was for a fictitious consideration and in fraud of the rights of the plaintiffs' father, Dayal Singh, as next heir and reversioner on the death of the widow of Danna Singh, the deceased owner. Kehr Singh died while the suit was pending. The only question in dispute in this appeal is whether the lands were ancestral. The District Judge has held that they were not. The Chief Court has reversed his decision and held that they were.

It is not disputed that the onus on this issue is on the plaintiffs, and it is because in the opinion of the District Judge they failed to discharge this onus that the suit was dismissed.

It is through their father, as heir of the above-named Dhanna Singh, that the plaintiffs claimed, and unless the lands came to Dhanna Singh by descent from a lineal male ancestor in the male line, through whom the plaintiffs also in like manner claimed, they are not deemed ancestral in Hindu Law. Therefore if the plaintiffs cannot shew that they were not self-acquired lands in the hands of Dhanna Singh the suit fails. Now, as the District Judge points out, there is really no evidence that the lands in question came to Dhanna Singh by descent at all. There is evidence that he acquired some lands in the District by purchase from the owners, and there is a probability that he acquired others by the abandonment of other persons who may have been collateral, and in that way, may have become possessed of lands which, by the custom of the Punjab, would be regarded as ancestral. But there is no evidence whatever defining the boundaries of these portions of land, respectively. Indeed, the learned Judges of the Chief Court themselves say: "It is impossible to differentiate between the portions which came from relatives and co-sharers and the portions which may have in some instances been purchased." But it is by reason of this impossibility that the plaintiffs failed to prove their case. The learned District Judge also points out that, since the death of Dhanna Singh, large portions of the land held by him have been sold by his widow, and it is quite possible that all the ancestral land, if he had any, was embraced in these sales, and that the sale of the lands in question embraced exclusively self-acquired lands. Their Lordships agree that when the

onus lies, as it does in this case, on the plaintiffs in seeking to set aside on such grounds a solemn deed executed by their father, conjectures cannot be accepted as a substitute for proof. With the greatest respect to the Judges of the Chief Court, their Lordships venture to think that they have hardly given sufficient weight to this consideration. Their Lordships agree with the conclusions and reasoning of the learned District Judge, and will humbly advise His Majesty that the appeal be allowed and the decree of the Chief Court set aside with costs. The respondent must pay the costs of this appeal, except so far as they may have been increased by the delay which has taken place in the prosecuting the appeal.

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Appellants' Solicitors—Messrs. *Watkins and Lempriere.*
The respondent did not appear.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[On appeal from the Madras High Court.]

Present:—Lord Robertson, Lord Atkinson, Lord Collins, Sir Andrew Scoble and Sir Arthur Wilson.

Sankaralinga Nadan and others .. Appellants*

v.

Raja Rajeswara Dorai *alias* Muthuramlinga Dorai and others Respondents.

Sankaralinga v. Raja Rajeswara

Trustee, suit by—Decree in plaintiff's favour—Appeal by defendants—Plaintiff's application to alter the judgment so as to defeat his own action—New plaintiff, joining of—Surrender of a decree in his favour by a trustee—Betrayal of trust—Refusal of the Court to alter the decree.

The plaintiff, the hereditary trustee of a temple dedicated to the worship of Shiva, and where the customary ceremonies of Hindu worship were carried on, sued the defendants, who represented a caste called the Nadar or Shanar caste. The question between the parties was whether the defendants and the caste to which they belonged had legal right to enter and worship in the temple. The First Court decided against the defendants, who thereupon appealed to the High Court. The plaintiff thought fit to profess that he then saw that he and the judge of the lower Court were wrong and asked the High Court that the judgment of the lower Court should be altered so as to defeat his own action. The High Court, on being applied to, as their Lordships held very properly, reinforced the cause of the worshippers of the temple by joining certain new plaintiffs to the original plaintiff (whose confidence in the justice of his suit had by that time convalesced). The High Court refused to alter the decree and their

* 16th June and 1st July 1908.

Sankaralinga v. Raja Rajeswara

Lordships were of opinion that the principles applicable to the case of a trustee who thus betrayed his trust by surrendering a decree had been well stated and applied by the High Court.

Appeal from a decree of the High Court of Judicature at Madras affirming a decree of the Court of the Subordinate Judge of Madura, East.

The principal question involved in the appeal was whether the appellants and other persons of the caste to which they belonged were prohibited from entering into and worshipping in the Hindu temple of Minatchi Sundareswaral, situate in the town of Kamudi.

On July 5, 1908, Raja M. Bhaskara Sethupathi instituted the suit in the Court of the Subordinate Judge of Madura (East). He was the Zemindar of Ramnad, and, as such, he was the hereditary trustee of the temple at Kamudi in the Madura District in which Shiva was worshipped under the form of Minatchi Sundareswaral. The defendants (the present appellants) were residents of Kamudi, and belonged to the Nadar or Shanar community. They were sued as representing that community under the procedure laid down by S. 30 of the Civil Procedure Code. The plaint alleged that the Shanars, as a caste, were prohibited both by custom and by the shastras from entering the plaint temple, but that, on May 14, 1897, the appellants forcibly entered the temple in procession with music and torches and performed acts of worship, and thereby polluted the temple and caused obstruction to the lawful worshippers. The plaintiff, therefore, prayed for a declaration that "neither the defendants nor other Shanars are entitled to enter into any part of the said temple," for a perpetual injunction to restrain them from so doing; and for the payment of Rs. 2,500 as damages.

The appellants, by their written statement, denied the acts of sacrilege alleged and claimed that "according to the shastras and custom these defendants have a right to use the plaint temple and to participate in the pooja and worship therein performed in the same manner and to the same extent as any other class in the place (Brahmins excepted) and have been from time immemorial exercising such right and participating in the pooja and worship therein." They admitted having entered the temple on May 14, 1897, and worshipped there in accordance with custom. They also denied the plaintiff's right to exclude them.

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On July 20, 1899, the Subordinate Judge delivered his judgment. He found that the appellants had not been allowed to use the plaint-temple in the past for worship; that the custom set up by them, in support of the right of entry, had not been made out; and that they belonged to a class which, under custom and the shastras, were precluded from entering the plaint-temple, which was governed by the ritual prescribed in the Saiva agamas adopted as authoritative and current in the Madura District. A decree was accordingly passed whereby it was "declared, ordered and decreed that neither the defendants nor the other members of their community living at Kamudi are entitled to enter into any part of the temple of Minakshi Sundareswaral at Kamudi subject to the trusteeship of the plaintiff and in his possession, that a permanent injunction be issued restraining the defendants and their fellow castemen at Kamudi from entering the said temple or any part thereof, and that the defendants do pay plaintiff on account of the temple and for the performance of the necessary purificatory ceremonies a sum of Rs. 500 and that each side do bear its own costs.

Against that decree the appellants appealed to the High Court of Judicature at Madras.

On May 2, 1901, a petition signed by the plaintiff and the appellants, was preferred, on behalf of the latter, to the High Court, in which it was stated that the parties had effected a compromise of the matters in dispute in the appeal, and prayed that the compromise might be recorded, and a decree passed in accordance therewith, in supersession of the decree of the Court of the Subordinate Judge.

The material part of the agreement of compromise, a copy of which was annexed to the petition, was as follows:—

" Whereas the plaintiff instituted the above suit and obtained " a decree therein declaring that neither the defendants nor other " members of their community living at Kamudi are entitled to " enter into any part of the temple of Minakshi Sundareswaral at " Kamudi, subject to the trusteeship of the plaintiff and in his " possession and permanently restraining the defendants and " their fellow castemen at Kamudi from entering the said temple " or any part thereof and awarding plaintiff Rs. 500 by way of " damages, and the defendants have preferred the said appeal No.

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" 11 of 1900 against that decree to the High Court of Judicature " at Madras and it is extremely uncertain as to what the result of " the said appeal will be; and whereas the plaintiff on full and " further enquiry is satisfied that as a matter of fact the defen- " dants and their caste people have enjoyed the right of access " to and of worshipping in the temples of Ramnad Zamindary " including the plaint temple at Kamudi in the same manner and " to the same extent as the Vellala, Chetti and other Sudra sects " of the Hindu community have enjoyed and that the defendants' " caste people have always enjoyed and do still enjoy the aforesaid " right of access and worship with reference to similar temples " situated elsewhere than in the Ramnad Zamindary; and whereas " the plaintiff is advised and instructed that according to the Hindu " Sastras the people of defendants' caste are entitled to the said " right of access and worship with respect to all Hindu temples; " and whereas the plaintiff has ascertained that the sentiments of " the general body of the Hindu community are in favour of the " defendants' caste people exercising their said right of access " and worship in respect of all Hindu temples, it is hereby agreed " as follows :—

"*First*, the plaintiff shall not exclude the defendants and " their caste people from exercising their right of free access to and " of worshipping in the said temple of Kamudi but shall allow " them to enjoy and exercise their said right of free access, and " worship in the same manner and to the same extent as such " rights are enjoyed and exercised by Vellala, Chetty, and other " Sudra sects of the Hindu community.

"*Secondly*, the defendants shall enjoy and exercise their said " rights in the same manner and to the same extent as the afore- " said sects of the Hindu community enjoy them, and that they " have no higher rights of access and worship in respect of the tem- " ple, and that the defendants are not liable to pay the plaintiff " any sum of money by way of damages.

"And *thirdly*, each party shall bear their own costs of the " suit and the appeal. It is further agreed that the plaintiff and " the defendants shall present a joint petition or petitions to the " High Court praying that the said decree in O. S. No. 38 (*sic*) of " 1898 on the file of the Subordinate Court of Madura (East) be " reversed and that a decree be passed in accordance with the " terms of this agreement." . . .

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On May 14, 1901, one Narayanasami Gurukkal applied to be made a respondent in the said appeal in order to oppose the said compromise. On May 29, 1901, one Vallasawmy Thevar made a similar application. On July 18, 1901, Raja Rajeswara Dorai *alias* Muthuramalinga Dorai, the infant son and heir of the plaintiff, by his mother and next friend, made an application of a similar nature. In the affidavits filed in support of those applications it was asserted that the plaintiff received monetary consideration for compromising the suit and that the compromise was fraudulent. On September 18, 1901, the High Court made an order directing that the three applicants should be brought on record as co-plaintiffs. At the hearing the High Court was informed that the plaintiff wished to withdraw from the compromise and intended to oppose it. The order of the High Court will be found reported in 12 M. L. J. 355.

The petition of May 2, 1901, praying for a decree in accordance with the terms of the compromise, then came on for hearing. It was supported by the appellants alone and opposed not only by the newly joined plaintiffs, but also by the original plaintiff, who expressed a desire to withdraw from the compromise. On September 25, 1901, the High Court dismissed the petition and made an order refusing to act on the compromise on the ground that it was a breach of trust on the part of the trustee of the temple, and as such was unlawful under the provisions of S. 375 of the Civil Procedure Code. *Benson* and *Boddam* JJ., who made the order, after stating the facts, observed that the mere withdrawal of the original plaintiff who signed the compromise would, by itself, be no ground for refusing to give a decree in accordance with it. The order of the High Court will be found reported in 12 M. L. J. p. 360.

On February 14, 1902, the High Court delivered its judgment in the appeal and found that a custom excluding Shanars from the temple was proved; that the custom was supported by the orginal low occupation of and estimation in which the Shanars were held; and also by the prohibition contained in the Agama Shastras, prevalent in the Madura District against the entry into a Siva Temple of persons whose profession was the manufacture of intoxicating liquor and climbing palmyra and cocoanut trees. In the result a decree was made dismissing the appeal with costs.

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Against that decree the appellants preferred an appeal to His Majesty in Council. The original plaintiff having died was represented on the record by his son Raja Rajeswara Dorai *alias* Muthuramalinga Dorai, who became the hereditary trustee of the temple and had already been joined as a co-plaintiff.

De Gruyther, K. C. and *Kyffin*, for appellants, contended that the compromise was binding on the respondents and ought to have been enforced by the High Court; that the Court of Appeal could not substitute new plaintiffs for the original plaintiff; that the Courts in India had wrongly held that Nadars as a caste were prohibited by custom from the use of the temple; and the Courts in India had wrongly held that Nadars and Shanars belonged to the same caste and that they were a low caste and did not belong to the twice-born classes; and that the Courts in India were in error in finding that members of the Shanar caste were not allowed by the Shastras to worship in a Siva temple.

Cohen, K. C., and *Brown*, for respondents, were not called upon.

Lord Robertson: Their Lordships would humbly advise His Majesty that the appeal ought to be dismissed for reasons to be stated later on.

Their Lordships' judgment giving reasons for their report was delivered by

Lord Robertson.—The question between the parties is whether the appellants and the caste to which they belong have legal right to enter and worship in a temple at Kamudi. This temple is dedicated to the worship of Shiva and the customary ceremonies of Hindu worship are there carried on. It is common ground between the disputants that the appellants represent a caste called the Nadar or Shanar caste. It is alleged by the respondents that the presence of persons belonging to the appellants' caste is repugnant to the religious principles of the Hindu worship of Shiva and to the sentiments of the caste Hindus who worship in this temple, and that it is contrary to custom in this temple. Both Courts in India have decided against the appellants, the judgment of the Subordinate Judge discussing the question in great detail and with much research, and the High Court at Madras resting their decision upon extremely comprehensible and cogent grounds. The controversy touches, but does

not involve delicate and abstruse questions of Hindu religious doctrine. In the view of their Lordships, it admits of decision upon a much more palpable and limited range of facts.

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First of all, the appellants, as a matter of fact, worship by themselves in a temple of their own. Secondly, the result of the evidence is a complete failure to prove any resort by persons of the appellants' caste to the temple in dispute. Those two facts not merely negative the case of the appellants that they " have been from time immemorial * * * participating in the poojah and worship " in the disputed temple, but they make easy the respondents' further contention that this separation in worship between the two classes was not accidental or voluntary, but rested on a deeper ground.

The evidence has been admirably analysed by the High Court, and their appreciation of the quality of the evidence, on the one side and on the other, concurring as it does with that of the Subordinate Judge, is entitled to the greatest weight.

The arguments addressed to their Lordships was directed rather against the soundness of the doctrine asserted by the respondents as involving the exclusion of Nadars, and it was endeavoured to show that there were inconsistencies in the respondents' treatment of the appellants in other respects. All this, however, as a matter of theological argument, is too rationalistic; while, on the other hand, it wanders from the region of fact and custom. What the respondents have succeeded in proving is that, by custom, the appellants are not among the people for whose worship this particular temple exists.

Their Lordships have spoken of " the respondents," generally, but it is necessary to note the espisode in the proceedings euphemistically described as " the compromise." The original plaintiff in the suit was the Rajah who was the hereditary trustee of this temple, which was the temple of one of the villages in his Zemindari. After the case had been decided in his favor by the Subordinate Judge, this person thought fit to profess that he now saw that he and the Judge were wrong; and he asked that the judgment should be altered so as to defeat his own action. A very sordid motive for this surrender was specifically asserted and has not been disputed. The Court, on being applied to, very properly reinforced the cause of the worshippers of the temple by joining

certain new plaintiffs to the original plaintiff (whose confidence in the justice of his suit had by this time convalesced). The principles applicable to the case of a trustee who thus betrays his trust by surrendering a decree have been well stated and applied by the High Court.

For these reasons, their Lordships, on the 16th June last, agreed humbly to advise His Majesty that the appeal ought to be dismissed, and ordered the appellants to pay the costs of the appeal.

Attorney for the appellants :—*Douglas Grant.*

Solicitors for the respondents:—*Chapman, Walker* and *Shephard.*

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.]

Present:—Lord Robertson, Lord Atkinson, Lord Collins, Sir Andrew Scoble, and Sir Arthur Wilson.

Pandit Gaya Parshad Tewari .. Appellant.*

v.

Sardar Bhagat Singh and another .. Respondents.

Gaya Parshad v. Bhagat Singh.

Malicious prosecution—Suit for damages—Principles applicable to the case—"Prosecutor"—Malice, foundation of the action—When may malice be shown—Defendant's knowledge as to the falsity of the charge—Liability.

The principle laid down in the case of *Narsinga* v. *Muthaya Pillai*[1]—"the only person who can be be sued in an action for malicious prosecution is the person who prosecutes"—is sound enough if properly understood, and its application to the particularcase was no doubt justified ; but it is not of universal application.

In India if a complainant does not go beyond giving what he believes correct information to the Police, and the Police, without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant, if he misleads the Police by bringing suborned witnesses to support it, if he influences the Police to assist him in sending an innocent man for trial before the Magistrate—it would be equally improper to allow him to escape liability because the prosecution has not, technically, been conducted by him.

The foundation of the action is malice, and malice may be shown at any time in the course of the inquiry.

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* 17th June and 31st July, 1908.

1. (1902) I. L. R. 26 Mad. 362.

The question in all cases for damages for malicious prosecution must be—Who was the prosecutor ?, and the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion ; the conduct of the complainant before and after making the charge, must also be taken into consideration. Nor is it enough to say, the prosecution was instituted and conducted by the Police. That again is a question of fact. A prosecution, though in the outset not malicious as having been undertaken at the dictation of a Judge or a Magistrate or if spontaneously undertaken from having been commenced under a *bona fide* belief in the guilt of the accused, may, nevertheless, become malicious in any of its further stages, if the prosecutor, having acquired practical knowledge of the innocence of the accused, perseveres *malo animo* in the prosecution with the intention of procuring *per ne fas* a conviction of the accused. Gaya Parshad v. Bhagat Singh.

[*Narsinga Row* v. *Muthaya Pillai* 1 explained and distinguished; *Fitz John* v. *Mackinder* 2 followed.]

Appeal from a decree of the Court of the Judicial Commissioner of Oudh (December 14, 1905) reversing a decree of the Court of the Subordinate Judge of Bahraich (July 31, 1905).

The principal question involved in the appeal is whether, on the facts found, the respondents are liable in law to an action for damages for malicious prosecution.

In the Kapurthala Estate is a village called Shukulpurwa. In the Rampur Mathura Estate is a village called Keora. Between these two villages flows the river Ghoora. The first respondent, Sardar Bhagat Singh, was in 1902, the Munsarim, and the second respondent, Imamuddin Shah, was, in the same year, the Kanungo of the Boundi division of the Kapurthala Estate, in which the village of Shukulpurwa is situate. The appellant, Pandit Gaya Parshad, was, at that time, Naib or Manager of the Rampur Mathura Estate.

On October 28, 1902, Imamuddin Shah reported to the Inspector of Boundi that on that day seven or eight hundred men of the Rampur Mathura Estate had entered the village of Shukulpurwa, cut and carried away the crops on certain lands, and stolen other crops and property belonging to the tenants.

On October 29, 1902, the Inspector made an order for Bhagat Singh to inquire and report. On October 30, 1902, he submitted a report, upon which orders were passed that proceedings should be taken under S. 145 of the Code of Criminal Procedure. The Kapurthala Estate was found by the Deputy Magistrate to be in

1. (1902) I. L. R., 26 Mad. 362.
2. (1861) 9 C. B. N. S. 505 ; 20 L. J. (C. P.) 257.

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possession, but his order was set aside by a Judge of the Court of the Judicial Commissioner of Oudh. On November 2, 1902, an application was made by one Gulab Singh on behalf of the Kapurthala Estate under S. 107 of the Code of Criminal Procedure to the Deputy Collector of Bahraich, who sent the application for inquiry by the Sub-Inspector of Police Izhar-ul-haq; certain persons named in the application were charged, and the appellant's name was not mentioned. Before the Police the respondents conducted the prosecution. The respondents procured evidence that a riot was committed and that the appellant had personally taken part in the riot. By procuring such evidence the respondents induced the Sub-Inspector of Police to send the appellant and the other accused for trial before the Deputy Collector of Bahraich. The prosecution was conducted by a barrister instructed by Bhagat Singh and Imamuddin Shah, and pressed under their instructions against the appellant, those proceedings terminated by an order made by the Magistrate on July 15, 1903, acquitting the appellant and all the other accused persons, and expressing the opinion that the charges had been concocted by the respondents. On July 14, 1904, the appellant instituted the present suit in the Court of the Subordinate Judge of Bahraich claiming damages from the respondents for malicious prosecution. The respondents by their written statement resisted the claim on the following grounds :—

Paragraph 11. Defendants did not institute any criminal prosecution, and were mere witnesses for the prosecution.

Paragraph 12. Defendants as witnesses were justified in making the statements they did in the Criminal Court, and no suit can legally be brought against them.

Paragraph 13. The prosecution was not malicious and without reasonable and probable cause, nor did it arise from any illegitimate motive.

The following issues were finally fixed by the Subordinate Judge :—

1. Was any report made to the Police, or any complaint lodged by the defendants or did any of them prosecute him on the charge of riot?

2. Was the prosecution malicious?

3. Was it without reasonable and probable cause?

4. Were the defendants mere witnesses for the prosecution? Gaya Parshad v. Bhagat Singh.

5. If so, is this suit not maintainable against them?

6. What is the amount of damages caused to the plaintiff?

On July 31, 1905, the Subordinate Judge delivered his judgment. He decided that although the names of the respondents did not appear on the face of the criminal proceedings, yet that in fact they were the prosecutors, that they had "concocted and fabricated false evidence to get the appellant charged with riotting;" that there was no reasonable and probable cause for the prosecution, and that the respondents had acted maliciously." He accordingly made a decree in favour of the appellant, awarding him the sum of Rs. 6082-8-0 as damages, and the costs of the suit.

Against that decree the respondents appealed to the Court of the Judicial Commissioner of Oudh, and on December 14, 1905, the Second Additional Judicial Commissioner delivered judgment in the appeal. On the authority of the cases of *Narsinga Row* v. *Muthaya Pillai* [1] and *Dudh Nath Kandu* v. *Muthura Prasad* [2] he, with hesitancy, decided that no one but a person who has made a formal complaint or application for process to a Court can be sued for damages for malicious prosecution. The part of his judgment referring to the merits of the case is given in their Lordships' Judgment below. He accordingly made a decree dismissing the suit, but without costs.

Special leave to appeal to His Majesty in Council against that decree was granted to the appellant by two Judges of the Court of the Judicial Commissioner of Oudh, under S. 595, Cl. (*c*) of the Code of Civil Procedure (Act XIV of 1882) on the ground of the importance of the question of law raised, and on the ground that the question had been wrongly decided, and that the decision was opposed to the authority of the case of *Musa Yakub Mody* v. *Manilal Ajitrai* [3] decided by the Bombay High Court.

DeGruyther, K. C., and *S. A. Kyffin* for the appellant:— There is no appeal on the question of the amount of damages. The High Courts in India are not unanimous on the question who can be sued for damages for malicious prosecution. The Madras and the Allahabad High Courts have held that no one but the

1. (1902) I. L. R. 26 M. 362. 2. (1902) I. L. R. 24 A. 317.
3. (190) I. L. R. 29 B. 368.

Gaya Parshad v. Bhagat Singh.

person who made a formal complaint or application for process to a Court can be sued for damages for malicious prosecution, and where a person merely gives information to the Police, and the Police, after investigation, appear to have thought fit to prosecute the plaintiff, the person giving information is not responsible for the act of the Police and cannot be sued successfully for malicious prosecution—*Dudh Nath Kandu* v. *Mathura Prasad*[1] and *Narsinga Row* v. *Muthaya Pillai*.[2] But the Bombay High Court has held that a person is responsible not merely for starting a prosecution but also for continuing the same, and he is also responsible whether such prosecution was ordered by the Court or was initiated by the party himself—*Musa Yakub Mody* v. *Manilal Ajitrai*.[3] It is submitted that the Bombay High Court is right. The Bombay High Court followed *Fitz John* v. *Mackinder*.[4] The findings of fact arrived at by the Subordinate Judge have been practically affirmed by the Judicial Commissioner, and on the facts, as found by the Courts in India, it is clear that the respondents knew that they were giving false information to the Police. They, in fact, conducted the prosecution and conducted the evidence. The Crown was the nominal prosecutor.

They actually instructed and paid counsel to press the charge against the appellant. The real foundation of the action is malice, which may appear at any stage of the proceedings. It is submitted that the respondents have shown malice in this case and that they are liable for damages for malicious prosecution—*Fitz John* v. *Mackinder*.[5] Reference was also made to the Code of Criminal Procedure (Act V of 1898) Ss. (*n*), 107, 147, 156, and 495, and Sehedule II to that Code.

The respondents did not appear.

The judgment of their Lordships was delivered by

Sir Andrew Scoble :—This is an action for damages for malicious prosecution. The parties are officials of adjoining estates, the plaintiff being the Manager of the Rampur Mathura Estate and the defendants being, respectively, Munsarim and Kanungo of the Boundi Division of the Kapurthala Estate. The case arose out of a dispute regarding the ownership of some

1. (1902) I. L. R. 24 All. 317.
2. (1902) I. L. R. 26. Mad. 362.
3. (1904) I. L. R. 29 Bom. 368.
4. (1861) 9 C. B. N. S. 505.
(5). (1861) 9 C. B. N. S. 505, and at pp. 522 and 532.

alluvial land lying between the two estates; and the charge was that the plaintiff had taken part in a riot connected with this dispute. The case was sent for trial on the 22nd November 1902 but was not disposed of until the 15th July 1903, when the Magistrate dismissed it, holding that "there was no riot at all" and adding: Gaya Parshad v. Bhagat Singh.

"I consider Kapurthala Estate entirely to blame in this case, and hold that Sardar Bhagat Singh (assisted by Imam-ud-din Shah) is responsible for concocting up these riot and theft cases with all the minor complaints." The plaintiff thereupon brought this action claiming Rs. 7,000 damages. The Subordinate Judge held that "it was found during the trial of the criminal proceedings, and proved before me by evidence in the case, that the two defendants have concocted and produced false evidence to get the plaintiff charged with the crime" and he gave the plaintiff a decree for Rs. 6,082-8-0 damages and the costs of the suit. The Judicial Commissioner on appeal, on the authority of the case of *Narsinga Row* v. *Muthaya Pillai*, [1] dismissed the suit, holding that "if the Police or Magistracy decide to act upon information given by a private individual without a formal complaint or application the Crown becomes the prosecutor and not the individual" but he added:

"I may say that, having studied the documentary evidence to which my attention was drawn and read most of the voluminous oral evidence recorded by the Subordinate Judge, I am disposed to believe that the Sub-Inspector did institute a charge under S. 147 at the instigation of Bhagat Singh and not of his own motion, that the charge was found false by the Magistrate who tried the case, and that the evidence on record produced by the appellants is not such as to incline me to believe to have been proved."

It will be convenient to refer at once to the decision of the Madras High Court (*ubi supra*) which the learned Judicial Commissioner seems to have followed with some reluctance. The judgment is in these terms:

"The only person who can be sued in an action for malicious prosecution is the person who prosecutes. In this case though the 1st defendant may have instituted criminal proceedings before

1. (1902) I. L. R. 26 Mad. 362.

Gaya Parshad v. Bhâgat Singh.

the Police, he certainly did not prosecute the plaintiff. He merely gave information to the Police, and the Police, after investigation, appear to have thought fit to prosecute the plaintiff. The defendant is not responsible for their act, and no action lies against him for malicious prosecution."

The principle here laid down is sound enough if properly understood and its application to a particular case was, no doubt justified, but in the opinion of their Lordships, it is not of universal application. In India, the Police have special powers in regard to the investigation of criminal charges, and it depends very much on the result of their investigation whether or not further proceedings are taken against the person accused. If, therefore, a complainant does not go beyond giving what he believes to be correct information to the Police, and the Police without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant, if he misleads the Police by bringing suborned witnesses to support it, if he influences the Police to assist him in sending an innocent man for trial before the Magistrate—it would be equally improper to allow him to escape liability because the prosecution has not technically been conducted by him. The question in all cases of this kind must be, —Who was the prosecutor, and the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion; the conduct of the complainant, before and after making the charge, must also be taken into consideration. Nor is it enough to say the prosecution was instituted and conducted, by the Police. That again is a question of fact. Theoretically all prosecutions are conducted in the name and on behalf of the Crown, but in practice this duty is often left in the hands of the person immediately aggrieved by the offence, who *pro hac vice* represents the Crown. In India a private person may be allowed to conduct a prosecution under S. 495 of the Criminal Procedure Code, which provides that "any Magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of Police: any person conducting the prosecution may do so personally or by a

pleader." When this is permitted, it is obviously an element to be taken into consideration in judging who is the prosecutor and what are his means of information and motives. The foundation of the action is malice, and malice may be shewn at any time in the course of the inquiry. As *Bramwell* B. observes in *Fitz John* v. *Mackinder* [1]:— Gaya Parshad v. Bhagat Singh.

"This action is not for damages in respect of the preferring of the indictment only, but also for the residue of the prosecution, and the damage consequent upon it. Where an action is maintainable in respect of the whole prosecution including the preferring of the bill, it is in part maintainable for the subsequent stages and conduct of it."

And in the same case, *Cockburn*, C. J., says (at page 531):—

"A prosecution, though in the outset is not malicious as having been undertaken at the dictation of a Judge or a Magistrate or if spontaneously undertaken from having been commenced under a *bona fide* belief in the guilt of the accused, may, nevertheless, become malicious in any of the stages through which it has to pass, if the prosecutor, having acquired practical knowledge of the innocence of the accused, perseveres *malo animo* in the prosecution, with the intention of procuring *per ne fas* a conviction of the accused."

Turning to the facts of the present case, it appears that on the 2nd November, 1902, an application was made to the Deputy Collector of Bahraich for an investigation by the Police of a charge of unlawful assembly against eight persons of whom the plaintiff was not one. The investigation was entrusted to Izhar-ul-huq, a Sub-Inspecter of Police who says :

"I summoned the plaintiff because Bhagat Singh gave me a list of accused persons containing plaintiff's name * * * When Bhagat Singh produced that list, I said to him that the complaint filed in Court did not contain Gaya Parshad's name. How was it that the defendants had mentioned his name? And then Bhagat Singh [said], that the chief cause of riot was the plaintiff; so he gave the plaintiff's name in the list, and that he would be summoned."

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1. (1861) 9 C. B. N. S. 505 at 522.

Gaya Parshad v. Bhagat Singh.

This makes it clear that Bhagat Singh was directly reponsible for any charge at all being made against the plaintiff. Imam-ud-din was the person who made the original report of an unlawful assembly, upon which the prosecution for riot was ultimately based, and the two men appear to have acted together throughout the subsequent proceedings. They took the principal part in the conduct of the case both before the Police and in the Magistrate's Court and the learned counsel who appeared for the prosecution at the trial before the Magistrate expressly says that they instructed him that Gaya Parshad "joined the riot." As already mentioned the Magistrate found that there was no riot at all, and that on the day in which it was alleged to have occurred, the appellant was ill at Lucknow. The charge was a false one to the knowledge of the respondents and they must abide the consequences of their misconduct.

In granting leave to appeal to His Majesty in Council, the learned Judicial Commissioners say:

"It is difficult to over-estimate the importance of the question raised in this case, namely, whether a person may be sued for damages for malicious prosecution who made a false report which results in a prosecution, or who instigates the Police to send persons up for trial under S. 170 of the Code of Criminal Procedure, or who conducts against those persons sent up for trial."

And they add:

"All these are circumstances which occur, perhaps, daily in every district in India, and having regard to the immense number of false charges made, (we) think it most desirable that there should be no doubt as to the law on the subject."

In the opinion of their Lordships, it would be a scandal if the remedy provided by this form of action were not available to innocent persons aggrieved by such unfounded charges, and they will humbly advise His Majesty that the appeal ought to be allowed and the decree of the Judicial Commissioner set aside, with costs, and that of the Subordinate Judge confirmed.

The respondents must pay the costs of the appeal.

Appellant's solicitors: *Messrs. Sanderson, Adkin, Lee* and *Eddis*.

The respondents did not appear.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

(*FULL BENCH.*)

Present :—Sir Arnold White, *Kt.*, Chief Justice, Mr. Justice Miller and Mr. Justice Munro.

Kalavagunta Venkata Kristnayya, and others .. Petitioners*
v. (*Defts. No.* 1, 3 *and* 4).

Kalavagunta Lakshmi Narayana .. Respondent (*Plaintiff.*)

Kalavagunta Venkatachalam and others .. Petitioners*
v. (*Defts Nos.* 1 *to* 4.)

Kalavagunta Lakshmi Narayana .. Respondent (*Plaintiff.*)

Venkata Kristnayya v. Lakshmi Narayana

* *Contract Act, S. 23—"Immoral or opposed to public policy"—Bride price—Contract to pay—Hindu Law—Marriage—Asura form.*

A contract to make a payment to a father in consideration of his giving his daughter in marriage is immoral and opposed to public policy within the meaning of S. 23 of the Indian Contract Act.

Obiter.—Though the Asura form of marriage when actually performed may be recognized as valid, it does not follow that an agreement for such a marriage would be legally enforceable.

[*Visvanathan* v. *Saminadan*[1] overruled ; *Vaithyanadham* v. *Gangaraju*[2] ref. to ; *Dholidas* v. *Fulchand*[3] foll.]

Petitions under S. 25 of Act IX of 1887 to revise the decrees of the Court of the Subordinate Judge of Kistna at Ellore, in S. C. S. Nos. 1353 and 1615 of 1905, respectively.

The Court (*Wallis* J. and *Munro* J.) made the following

ORDER OF REFERENCE TO A FULL BENCH:—In this case the plaintiff sues to enforce one of the terms of an award made by the panchayatdars who effected a partition between himself and his brothers. As the plaintiff had lost his wives whilst still a youth, the award, dated the 15th July 1886, provided that a fresh marriage should be celebrated at the expense of all the brothers and they should take upon themselves the responsibility of celebrating

C. R. P. Nos. 599 and 600, of 1906. 27th February 1908.

1. (1889) I. L. R. 13 M. 83.
2. (1893) I. L. R. Mad. 17 M. 9.
3. (1897) I. L. R. 22 B. 658.

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the marriage, search for a bride, pay the expenses required therefor in four shares, that is to say, other expenses excepting jewels, and have the marriage celebrated. The plaintiff did not marry until 1902, when he was between forty and fifty, and had to pay a bride price of Rs. 500, which took the form of a conveyance for land worth that amount, to the father of the girl, aged 10, whom he obtained in marriage. He has now sued one of the brothers under the award for a share of the marriage expenses including the bride price and has obtained a decree. It is now contended for the appellants that the award, so far as it involves payment of bride price, is illegal and void. This, in our opinion, involves the question whether an agreement with the father of a girl for a payment to him in consideration of giving his daughter in marriage should be regarded by the Court as "immoral or opposed to public policy" within the meaning of S. 23 of the Indian Contract Act. If so, by the terms of the section, the object or consideration of the agreement is unlawful and the agreement itself is void. If the agreement with the bride's father be for an unlawful object, then so much of the award in this case as obliges the plaintiff's brothers to enter into such an unlawful contract or to contribute to the payment made thereunder must also be unlawful, although in other respects the award may be enforced.—*Pickering* v. *Ilfracombe Railway Co.*[1]

If the point were not covered by authority we should have no hesitation in holding that such agreements for payment to a father in consideration of his giving his daughter in marriage are immoral and opposed to public policy, whether the question be approached from the standpoint of Hindu law or of justice, equity and good conscience which we are bound to administer. It is, no doubt, true that when a father gives his daughter in marriage in consideration of such a payment the marriage is valid. Seeing that this form of marriage is a survival from less civilised times and is still common among some sections of the Hindu community as well as for other reasons Hindu law has been unable to go so far as to refuse to recognize the validity of such marriages and has been compelled to tolerate them. Such contracts with a father are none the less opposed to Hindu conceptions of morality, and the statement of Mr. Ghose at page 604 of

1. (1868) L. R. 3. C. P. 235, 250.

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his Hindu law that it is certainly not allowable, according to the Smritis, to give or receive a price for the bride is abundantly borne out by the convenient collection of texts appended to the chapter in which this statement occurs. Not only is this not one of the approved forms of marriage, but it has received the opprobrious name of *Asura* or demon marriage as one unfitted for human beings. From the other standpoint, it is clearly opposed to the dictates of justice, equity and good conscience to allow a father to make a profit out of the fulfilment of the duty imposed upon him by Hindu law of finding a suitable husband for his daughter, and such contracts by a father would appear to be more and not less objectionable than marriage brocage contracts entered into by persons not having any special duty towards, or interest in, the parties to be married. The Bombay decisions ending with *Dholidas* v. *Fulchand*,[1] are in accordance with this view, and a similar view was expressed by *Garth* C. J. in *Ramchand Sen* v. *Audaito Sen and Srinath Sen*,[2] where it was unnecessary to decide the point. The decision in that case, that money paid to a father may be recovered back if the marriage does not take place, may be supported if the agreement be held illegal on the ground that money paid under an executory illegal agreement may be recovered back when the illegal agreement has not been executed —Leake on Contracts, p. 672, 3rd edition.

In *Visvanathan* v. *Saminathan*, [3] however, a contract to pay a father Rs. 400 for giving his daughter in marriage was enforced, and the Court declined to hold that in the present state of society the receipt by a Hindu father of money in consideration of giving his daughter in marriage is in every case without distinction immoral or contrary to public policy, and laid down that each case must be decided on its own merits. We feel great difficulty in following this decision, which throws upon the Court the duty of holding an enquiry as to all circumstances of each case. Such an enquiry would, we think, be very objectionable as the Court might be called to go into all sorts of embarrassing questions, and there would be no well-established standard by which the propriety of the particular agreement could be tested. In considering whether any particular contract is illegal the Courts have

1. (1897) I. L. R. 22 B. 658. 2. (1884) I. L. R. 10 C. 1054.
3. (1889) I. L. R. 13 M. 83.

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generally considered whether the tendency of such contracts if enforced would be adverse to morality or public policy, rather than the precise amount of mischief which would be likely to result from enforcing the particular contract before the Court. We think this is the right way to approach the question and we agree with the observation of *Farran* C. J. in *Dholidas* v. *Fulchand*[1] at page 662: "If this Court were to enforce such a contract when the amount is small and in accordance with caste principles, it would, I think, be impossible to treat other contracts of a similar kind, but differing only in amount, as unenforceable." In view of the fact that the decision in *Visvanathan* v. *Saminathan*[2] has been referred to without disapproval in *Vaithyanathan* v. *Gangarazu*,[3] and has been followed in *Baldeo Sahai* v. *Jumna Kunwar*,[4] and as the question is important, we have resolved before deciding this case to make the following reference to a Full Bench.

"Is a contract to make a payment to a father in consideration of his giving his daughter in marriage to be regarded as immoral or opposed to public policy within the meaning of S. 23 of the Indian Contract Act?"

These petitions came on for hearing in due course before the Full Bench constituted as above.

E. Venkatarama Sarma for petitioners in both cases

K. Subramania Sastri for respondents in both cases.

E. Venkatarama Sarma.—*Visvanathan* v. *Saminathan*[2] is inconsistent with *Vaithyanathan* v. *Gungaraju*.[3] The correct principle has been laid down in *Dholidas* v. *Fulchand*[1] and *Ramchand Sen* v. *Aditya Sen* and *Srinath Sen*.[5] The principle followed in *Visvanathan* v. *Saminathan*[2] and *Baldeo Sahai* v. *Jumna Kunwar*[4] is highly inconvenient in application. Selling a girl is denounced by Manu as 'Kanyavikraya.' A wife married under the *Asura* form is not a *putni*. She is unfit for Brahmins and is forbidden. The view taken in *Dholidas* v. *Fulchand*[1] is more in accordance with the Hindu spirit than the view taken in *Visvanathan* v. *Saminathan*.[2]

K. Subaramania Sastri—for respondents—relied upon *Baldeo Sahai* v. *Jumna Kunwar*[4] and the principle laid down therein.

1. (1897) I. L. R. 22 B. 658 at 662.
2. (1889) I. L. R. 13 M. 83.
3. (1893) I. L. R. 17 M. 9.
4. (1901) I. L. R. 23 A. 495.
5. (1884) I. L. R. 10 C. 1054.

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The contract may, in fact, be a provision for the girl, or may be necessary for the marriage of the girl herself, which ought to be done under the Hindu Law before puberty. The conditions in India make it inexpedient to apply the English principles strictly. Whatever may be the view of the *Smrities*, custom does not forbid the *Asura* form but approves of it.

The Court delivered the following

OPINIONS :—*The Chief Justice*:—The question which has been referred to us is " Is a contract to make a payment to a father in consideration of his giving his daughter in marriage to be regarded as immoral or opposed to public policy within the meaning of S. 23 of the Indian Contract Act?"

I am of opinion that our answer to this question should be in the affirmative.

I should have had little hesitation in coming to this conclusion had it not been for the fact that in *Vaithyanathan* v. *Gangarazu*[1], in which the judgment was delivered by Sir *Muthuswamy Aiyar*, the learned Judges would appear to have approved of the decision in an earlier case, *Visvanathan* v. *Saminathan*[2], in which a contract to make a payment to a father in consideration of his giving his daughter in marriage, the marriage having taken place in the *Asura* form, was held to be enforceable. There can be no doubt that the contract which was held to be contrary to public policy in *Vaithyanathan* v. *Gangarazu*[1] was a marriage brocage contract, in the ordinary acceptation of the term, whilst in *Visvanathan* v. *Saminathan*[2] the contract was with the father. Further, I do not think it can be said that the Judges who decided *Visvanathan* v. *Saminathan*[2] intended to limit this decision to cases where the marriage had taken place in the *Asura* form. There are general observations in the judgments in *Visvanathan* v. *Saminathan*[2] which go to show that the learned Judges were of opinion that the English rule of law was not applicable, apart from any question of the form of the marriage, and Sir *Muthuswami Aiyar* in *Vaithyanathan* v. *Gangarazu*[1] did not dissent from those observations. Sir *Muthuswami Aiyar* based his decision on two grounds, *viz*, " that the justice or the public policy is open to no question, and that no established usage precludes its application except in the case of a money payment agreed to be made to the

1. (1889) I. L. R. 13 M. 83. 2. (1893) I. L. R. 17 M. 9.

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Chief Justice.

father of the girl in the *Asura* form." The learned Judge appears to have intended to limit his exception to cases where the marriage took place in a form which necessarily involved a money payment to the father. Although it may be, that as regards the particular case in which the present order of reference has been made, the question does not arise, we cannot answer the question, in the general form in which it has been referred to us, without deciding whether the rule does or does not apply when the marriage is in the *Asura* form. It is to be observed that the learned Judges who decided *Vaithyanathan* v. *Gangarazu*[1] were not considering the general question which we have to decide but the special question whether the earlier decision, where the marriage had been in the *Asura* form, was good law. The question arose for consideration in the Bombay High Court in *Dholidas* v. *Fulchand.*[2] In his judgment in that case *Tyabji* J. after referring to the authorities, said: "The above authorities seem to me to establish conclusively that a promise to pay money to a Hindu father, in consideration of his giving his son or daughter in marriage, cannot be enforced in a Court of law. It is no doubt, true, however, that the *Asura* form of marriage which is legal among the lower castes, is nothing more than the purchase of a wife from her father by the husband. It has, therefore, been contended that so long as such a form of marriage is permitted, payment of money to the father of a boy or girl cannot be illegal and must be enforced. I agree, however, with *Scott* J. in thinking that this argument is not well founded, for though the *Asura* form of marriage when actually performed may be recognised as valid, it does not follow that an agreement for such a marriage would be legally enforced. Manu himself denounces it strongly, and lays it down in S. 24 that 'the ceremonies of *Asura* must never be performed.' I think, therefore, that though the money, if actually paid to the father in consideration of the marriage, cannot be recovered back when once the marriage is solemnized, it by no means follows that a suit to recover the money, where it has not been paid, would lie." I think, this is the better view and I am prepared to adopt it.

In my opinion a question of this sort should be decided on general principles and not with reference to the special terms of a

1. (1893) I. L. R. 17 M. 9. 2. (1897) I. L. R. 22 B. 658, 664.

particular contract. I entirely agree with the observation in the order of reference that an enquiry in each case as to whether, having regard to the terms of the particular contract, the contract is or is not contrary to public policy, would be very objectionable. Venkata Krishnayya v. Lakshmi Narayana.

I would answer the question in the affirmative.

Miller J. and *Munro* J. :—We agree and have nothing to add.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Miller.

Rajah Venkata Narasimha Appa Rao Bahadur .. Defendant* (*Appellant*).

v.

Rajah Surnani Venkata Purushottama Jugganadha Gopala Row Bahadur and 2 others .. Plaintiffs (*Respondents*).

Hindu Law—Inheritance—Priority—Daughter's daughter and Father's sister's son's son—Widow—Accretion to estate—Religious endowment—Dharmakartaship—Prescription for hereditary Dharmakartaship—Nature of right acquired. Appa Rao v. Gopala Rao.

The father's sister's son's son is entitled to succeed to the estate of a Hindu in preference to his daughter's daughter.

Where the holder of a life estate (*e.g.*, a daughter) in a Zamindary built a palace on Zamindary land out of the income of the Zamindary over which she had absolute power of disposal for Rs. 40,000 as a residence for the zemindar for the time being:

Held: that apart from any question of intention on the part of the life-estate holder, the building should be held to have become part of the estate and should consequently devolve as part of the estate.

Held further. that in the case in question, intention of the life-estate-holder was also to incorporate the building with the estate.

If a man obtains possession of land claiming under a deed or will, he cannot afterwards set up another title to the land against the deed or will though it did not operate to pass the land in question, and if he remains in possession till 12 years have elapsed and the title of the testator's heir is extinguished he cannot claim by possession an interest in the property different from that which he would have taken if the property had passed by the will or deed. [*Dalton* v *Fitzgerald*[1] followed.]

A Hindu widow or daughter succeeding to a Dharmakartaship held by the last male owner cannot by possession for over 12 years claim any more interest in the Dharmakartaship than a life-estate which is the interest they would have ordinarily taken if the same had passed to them by will or deed.

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*A. No. 157 of 1905. 26th February, 1908.

1. (1897) 2 Ch. D. at 93.

Appa Rao v. Gopala Rao.

Appeal from the decree of the Subordinate Judge of Kistna in O. S. No. 30 of 1903.

T. V. Seshagiri Aiyar and *P. Nagabhushanam* for appellants.

Sir V. Bhashyam Aiyangar, V. Krishnaswami Aiyar and *C. R. Tiruvenkatachariar* for respondents.

T. V. Seshagiri Aiyar cited, on the question whether a widow treats buildings constructed out of incomes derived from her husband's estate as part of the estate, *Subramanian Chetti* v. *Arunachalam Chetti*[1]; *Akkanna* v. *Venkayya*[2]; *Isri Dut Koer* v. *Hansbutti Koerain*[3]; *Sowdaminee Dasi* v. *The Administrator-General of Bengal*[4]; *Sheolochun Singh* v. *Saheb Singh*.[5] There is no presumption that the widow would treat the new property as an accretion to her husband's estate.

Limitation in respect of trusteeship of the temple *and its properties.* The history of this is as follows :—

Originally the temple and its properties were not under the management of the Mylavaram Zemindars.

The temple is not in Mylavaram but is in Chintalapudi. In 1823 these (*i. e.*, temple, its properties and the trusteeship) were mortgaged to the Mylavaram Zamindar by the Chintalapudi trustee. Until 1849 they were with the Zamindar. From 1849 to 1855 they were with the sons of the mortgagee. In 1855 there was an agreement between the two brothers in the Zemindari about this temple. The agreement was that the younger should not have any concern in the temple and its affairs. On the same day in 1855 the younger brother writes to the Kurnams that the trusteeship is to vest thereafter in his elder brother and his descendants from generation to generation and that he must be looked to for orders, etc., in connexion with the temple. In 1859 the elder brother, by his will, directed his wife Venkamma to be its trustee. In 1877 this Venkamma directed, by her will, her daughter Chinnaya Row to be its trustee. In Ex. *XVI*, it is mentioned that the temple was under the hereditary management of Chintalapudi family. From 1877 up to date of suit, the temple was with the daughter Chinnaya Row.

1. (1904) I. L. R. 28 M. 1.
2. (1901) I. L. R. 25 M. 351.
3. (1883) I. L. R. 10 C 324 (P.C.)
4. (1892) I. L. R. 20 C. 433: P. C.
5. (1887) I. L. R. 14 C. 387 (P. C.).

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Succession to the temple management does not follow the line of succession of other estates of the family. There is no definite course of succession with regard to this management. There is only one succession with regard to this, *i. e.*, from the father to the son, then the widow and then her daughter. Venkamma succeeded as full owner to the management under her husband's will. Then she made a gift of it to her daughter in 1877. The widow prescribed for the trusteeship and it became her absolute property.

[*Benson* J :—If there is a definite course of succession in regard to the general estate, then why should not this also go likewise ?]

T. V. S. Under the will of her husband the widow got the management absolutely. Then her daughter held it as donee absolutely. It is the daughter's stridhanam. Moreover, both the widow and the daughter held it adversely against others, each for more than 12 years. The lower Court's judgment is that if the original trustee had a right to appoint his successor, any trespasser on the trusteeship acquires that right to appoint his successor. One brother who was entitled only to half of the trusteeship cannot renounce his right in favour of his other brother, who is the owner of the other half.

The elder brother in the Mylavaram family did not acquire any hereditary right in the management of the temple. Even two or three successions lineally do not create any hereditary right—*Kaliana Sundaram Ayyar* v. *Umamba Bayi Saheb*[1] ; *Janaki* v. *Goswami*[2] ; *Appasami* v. *Nagappa*[3] ; *Greedharee* v. *Nundokissor.*[4]

[*Benson* J :—You have not been able to cite any instance where trusteeship in the family descended to a different person from the heir.]

T. V. S.—None in this family in which there were very few successions. *Janaki* v. *Goswami*[2] says that it might descend to other persons and that it need not descend hereditarily.

[*Miller* J.—Suppose the first male in this family had been the founder of the trust ; then how would it descend ?]

T. V. S.—Not necessarily hereditarily as was held in *Appasami* v. *Nagappa*[3] and *Janaky* v. *Goswami*[2]. The trusteeship itself came

1. (1897) I. L R. 20 M. 421, 432.
2. (1882) 9 C. 766, 769 P. C.
3. (1884) I. L. R. 7 M. 499, 507.
4. (1847) 1 M. I. A. 405.

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to the family after the first man prescribed for it having got it by the illegal transfer in 1823. It is the plaintiff that must establish a hereditary right with regard to the trusteeship. He has not proved it.

[*Miller* J.—The will only says:—" The wife shall conduct the *utsavam* according to mamool and the trusteeship in the temple."]

Whether the will gives her any right as trustee absolutely or not, she exercised that right absolutely and, therefore, she prescribed for it. Her *animus* is shown by her will in favour of her daughter. The daughter undoubtedly prescribed for it as a donee with absolute rights.

Sir *V. Bhashyam Aiyangar* for respondent.—Even if I am held not adopted I am a Bandhu. A paternal aunt's son's son is nearer than the daughter's daughter under the rulings of this Court. The position which this High Court assigns to female heirs not specifically mentioned in the text is next after all the male Bandhus. Sister's son was preferred to a sister by reason of sex.—*Lakshmanammal* v. *Tiruvengada Mudali*[1]; Mayne's Hindu Law, 7th Edn. p. 729, para 539. A son's daughter is a bandhu—*Nallan* v. *Pornal*[2]. A maternal grandfather is preferable to the paternal aunt—*Chinnammal* v. *Venkatachala*[3]. Mother's brother was preferred to father's sister—*Narasimma* v. *Mangammal*[4]. A daughter's daughter is a bandhu—*Ramappa Udayan* v. *Armugath Udayan*[5]. Daughter's son's son is preferred to daughter's daughter's son. Male bandhus excluded female bandhus—*Sundarammal Rengasami*[6]; *Thirumalachariar* v. *Andalammal*[7].

Admittedly paternal aunt's son's son is a bandhu and an heir.

As regards accretions.—The palace was intended to be built on kamatam lands and Venkayamma laid the foundation stone, but owing to some ill omen it was abandoned. If it was built as intended on those lands it would certainly have belonged to the estate and would have descended to the reversioners. Kamatam, (*i.e.*, home farm, *i.e.*, pannai) lands do belong to the Zamindari. This fact shows the intention.

1. (1882) 5 M. 241.
2. (1890) 14 M. 149.
3. (1891) 15 M. 421.
4. (1889) 13 M. 10.
5. (1893) 17 M. 182.
6. (1894) 18 M. 198.
7. (1907) 17 M. L. J. 285.

It is built on three sites one of which belonged to the Zamindari; the second was land got in exchange for land relinquished by a tenant; the third was a relinquished village site. Appa Rao v. Gopala Rao.

There is evidence that the old Zamindar's house was on the same site. The palace is described as "palace appertaining to the Zamindari" in the accounts kept for building it. If one having a life interest on a site builds a permanent palace thereon, then, as a matter of law, the palace goes to the full owner after the termination of the life-estate. There is ample evidence of intention to treat it as accretion to the estate. Moreover, the palace is one which is appropriate only to a Zamindar. A Zamindar who is the full owner of his income and who builds a pucca palace there-with intends it for the Zamindari. In this case this erection of the palace is nothing more than an enlargement of the old palace of the Zamindari that was once standing thereon.

On the question of limitation with regard to trusteeship.— The trusteeship was originally hereditary in the Chintalapudi family. It is conceded here *Kalianasundara* v. *Umamba Bayi*[1] has no reference to this case. The question there was whether the trusteeship was hereditary.

We shall take for argument's sake that the transfer of the trusteeship was illegal and void. Then the trusteeship came to the Mylavaram family by trespass. Then this family must be deemed to hold it in the same way as the Chintalapudi family, *i.e.*, with hereditary rights. Moreover, the mortgage itself, whether legal or illegal, descended hereditarily. A trespass even of a hereditary office on the expiry of 12 years not only extinguishes the right of the original owner but creates a right of ownership in the trespasser—Limitation Act, S. 28; Art. 124; Act IX of 1871, S. 28.

The junior brother does not relinquish his half right in trusteeship. He says simply that both the brothers were joint trustees and that on division the eldest alone should take it. The agreement or *Samakhya* of 1855 says that *both* arranged that the

1. (1884) I. L. R. 7 M. 499.

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elder should have it alone. Even under the will of 1859 the elder brother gives the trusteeship to the widow only as widow and not otherwise. For it says "according to law the wife is the karta" "the wife shall be our karta according to law." Some stridhanam is expressly given to the widow. Therefore the widow held the trusteeship she was holding as heir or karta according to law as mentioned in the will, *i.e.*, she held it as a widow. There is no disposition of trusteeship in the will in favor of the widow. Trusteeship is property—*Gnanasambanda* v. *Velu Pandaram.*[1]

Even a joint trusteeship might be acquired adversely—*Balwant Rao Bishwant Chandrashor* v. *Puran Mal.*[2] The gift deed in 1877 to the daughter is to the daughter only as the next heir. The gift of 1877 is not merely of the trusteeship. All other properties are disposed of in favour of the grantee in *the same way*. In respect of the other properties it is not claimed that either the widow or the daughter obtained absolute ownership. The widow purports to transfer only what she has.

Dalton v. *Fitzgerald.*[3]—If a man gets possession of property under a deed or will and is in enjoyment thereof, he cannot set up that he got into possession in any other way or that he prescribed for any other kind of possession than that under the will or deed. Therefore, it being here conceded that the daughter got the trusteeship under the deed of 1877, she cannot say that she became full owner by limitation adversely against the reversioners, if the will on its proper construction gives only a limited estate. *Janoki* v. *Goswami*[4] is distinguishable as it only prohibits a course of succession contrary to the Hindu Law.

The Court delivered the following

JUDGMENT:—In this case the plaintiffs sued to recover possession of certain moveable property which was in the possession of Venkata Chinnaya Rao at the time of her death in 1902 and also of a house built by her and of the Darmakartaship of a certain temple which was under her management at the time of her death, and which then passed into the possession of her husband who is

1. (1899) I. L. R. 23 M. 271; P. C.
2. (1883) 10 I. A. 90.
3. (1897) I. L. R. 2 Ch. 86.
4. (1882) I. L. R. 9 C. 766, P. C.

the defendant. The Subordinate Judge dismissed the suit as regards the moveable property, which he held was Chinnaya Rao's absolute property, and which, therefore, passed to her husband on her death. The other property he decreed to the plaintiffs. Against that decree the defendant appeals. The plaintiffs filed a memorandum of objections as regards the moveable property, but it was not moved before us.

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The relationship of the parties and of various members of the family is shewn below :—

- Rajah Lakshmi Rayanam Garu.
  - Venkatapathi Rao (died 23rd July 1849)
    - Jagannatha Lakshma Rao (died 31st July 1859) (married) Lakshmi Venkamma Rao (died May 1893.)
      - (Their daughter is) Venkata Chinnayya Rao (died 12th March 1902) married Sri Rajah Venkata Narasimha Appa Rao (Defendant—Appellant.)
        - Venkata Sobhannachala Jagannatha Lakshmi Royappa Rao (died 18th August 1890.)
        - Raghunatha Appa Rao (died 3rd June 1893.)
    - Venkatagopala Narasimha Rao (died 1887.)
      - 1st plaintiff.
      - 2nd plaintiff.
      - 3rd plaintiff.
  - Ramachendra Rao.
  - Sayamma Rao Jupalle Venkataraghava Rao.
    - Venkata Gopala Narasimha Rao is alleged to have been adopted in 1831.

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Jaganatha Lakshma Rao and his brother Venkatagopala Narasimha Rao, who is the father of the plaintiffs, lived as joint members of a Hindu family under the Mitakshara law until 1855 when they divided all their property. Jagannatha under the partition obtained 1 and 1/4 share of the Mailavaram estate and also the Dharmakartaship of the Dwaraka Tirumala Temple which is in dispute. In 1859 he made a will in which *inter alia* he directed that his wife should "conduct the Darmakartaship" of the temple. He died in the same year, and as he had no sons, his property passed to his widow Venkamma Rao. In 1877 she executed a deed of gift in favour of her only child, Venkata Chinnaya Rao, the wife of the defendant, whereby she gave her at once the 1 and 1/4 share in the Mailavaram estate and also the Dharmakartaship of the temple, but retained one village of the estate for her own maintenance and also the house in which she lived and gave these to her daughter after her death. She died in 1893 and her daughter Chinnaya Rao died in 1902. It will be observed from the genealogical tree that Chinnaya Rao had two sons, but both of them died many years before her. On her death her husband, the present defendant, took possession of the Dharmakartaship and of the house with its site and grounds. The present plantiffs, it will be observed from the family tree, are the sons of Venkatagopala Narasimha Rao, the brother who divided from Jaganatha Lakshma Rao in 1855. They got possession of the 1 and 1/4 share of the Mailavaram estate on the death of Chinnaya Rao and the defendant's suit to recover it founded on Jagannatha's will of 1859 has been dismissed by our judgment in Appeal No. 98 of 1904 delivered to-day. The present suit is brought by the plaintiffs as reversioners of Jagannatha Lakshma Rao to recover the house above referred to and the Dharmakartaship.

For the reasons stated in our judgment in Appeal No. 98 of 1904 the defendant cannot resist the plaintiffs' claim by virtue of any title conferred by the will, but he also resists on other grounds. One of these is that Venkatagopal Narasimha Rao, the father of the plaintiffs, had been adopted in 1831 by Jupalle Venkataraghava Rao who was married to Sayamma Rao, the sister of Venkatapathi Rao who was the father of Jagannatha Lakshma Rao and of the plaintiff's father, and that the plaintiffs

had thus passed into another family and could only claim as bandhus through their grandmother, Sayamma, and that Chinnaya Rao had daughters living who are reversioners nearer in degree than the plaintiffs and who therefore take the property in preference to them. We do not think that the question of the adoption affects the plaintiffs' rights to the property in dispute. If the property is property that will pass to the reversioners of Jagannatha Rao, in other words, if the property was not the stridhanam or absolute property of Chinnayya Rao, then the plaintiffs being male or "regular" bandhus are entitled to it by virtue of their sex in preference to any female reversioners even though the latter may be nearer in degree and the plaintiffs are bandhus even if their father was adopted. In that case they are bandhus as the sons of the (adopted) son of the sister of the father of the deceased Jaganatha Lakshma Rao. This has long been the settled law in this Presidency (see Mayne's Hindu Law, para 593, 7th edition, and the cases there quoted by him). The question then is, whether the property was the stridhanam or absolute property of Chinayya Rao. The defendant claims the house as such because it was built by Chinnaya Rao out of the income of the Mailavaram estate, and there is no question but that the income belonged absolutely to Chinnaya Rao whether she was the full owner of the estate or had only a woman's limited estate therein. The plaintiffs claim the house as an accretion or addition to the Mailavaram estate. We think that the Subordinate Judge was right in finding the plaintiffs' claim proved. It is highly significant of Chinnaya's intention that this house should be a palace, or residence for the Zamindar (*i. e.*, for herself during her life and thereafter for her son who was then alive) that she intended to build it on the home farm (kamatam) land of the estate and did actually spend Rs. 1,000 on the construction of a large house on this site, but abandoned it as she considered the death of her son which took place at this time was an evil omen. She, however, considered that her dignity as Zemindarni of the larger part of the estate required her to have a suitable palace; and the more so as the plaintiffs, who owned the smaller part of the estate, had built themselves a fine upstair house. She therefore spent no less than Rs. 40,000 on her palace, and we find that the site and grounds were largely land which undoubtedly belonged to the estate. Part of this land, we

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find from the evidence of the Peshkar, belonged to Jagannatha himself, part was acquired by Venkamma in exchange for an abandoned site which belonged to the estate, and parts were lands relinquished to Venkamma and Chinnaya as owners of the estate. In the deed of gift in 1877, already referred to, Venkamma left to Chinnaya after her death, "the vacant site and houses in Mailavaram" and directed that they shall vest in Chinnayya "along with the estate," *i. e.*, as part and parcel of the estate. This shows plainly that this part of the site of the buildings in dispute belonged to the estate and was not part of the private property of Chinnaya. Lastly, the pay lists of the coolies employed (Exhibit *S* series) in building the palace show that they were "doing the work of constructing the upstairs of the palace appertaining to the 1 and ¼ estate of Mailavaram." We think it is clear from all the evidence that the buildings in dispute were constructed as a palace or residence for the Zamindar for the time being and were intended to go with the estate as part of it, and not to be kept as the private property of Chinnaya's heirs if they should be dissociated from the estate. Moreover, the buildings being, in large part, on land belonging to the estate, would go with the estate apart from any intention of Chinnaya to treat them as part of the estate.

We think, however, the intention is sufficiently clear and the very character of the buildings indicates that the intention was as we have said. That being so, though the fund out of which the buildings were constructed, was the absolute property of Chinnaya, yet the buildings must devolve as part of the estate in accordance with the intention of Chinnaya to treat them as such—*Subrahmaniam Chetty* v. *Arunachellam Chetty*[1] and *Akkamma* v. *Venkayya*[2].

With regard to the Dharmakarthaship it is necessary to see what is its history. It was originally not a part of the Mailavaram estate, but was part of the Chintalapudi estate. In 1823 the Chintalapudi estate was mortgaged with possession to Venkatapati Rao (the father of Jagannatha Lakshma Rao) and he took possession of the Dharmakartaship at the same time and held it till his death in 1849. It then passed to Jagannatha and his brother (the father of the plaintiff) until they divided in 1855

1. (1904) I. L. R. 28 M. 1.
2. (1901) I. L. R. 25 M. 351.

when it was given to Jagannatha along with his 1¼ share in the Mailayaram estate. This Dharmakartaship originally descended hereditarily when it appertained to Chintalapudi estate and in the deed of 1855 it is also expressly stated that it is to descend in the family of Jagannatha " from generation to generation."

In the will of 1859 Jagannatha directs that his wife Venkamma is to conduct the Dharmakartaship, and in 1877 Venkamma as already stated gave the possession of the estate and of the Dharmakartaship to Chinnaya Rao. It is evident that this property has always passed as an hereditary estate just as did Jaganatha's share of the Mailavaram Zemindari, and it would therefore *prima facie* pass to the plaintiffs as the reversioners entitled to the hereditary property of Jagannatha Rao. But the defendant attempts to resist the claim by raising an ingenious plea founded on the law of limitation. As we understand the contention, it is that the transfer of the Dharmakartaship to Venkatapathi in 1823 was illegal as being against public policy and that possession of it was therefore that of a trespasser as was also the possession of Jagannatha, Venkamma and Chinnaya and consequently adverse to the plaintiffs, and that this adverse possession had given rise to an absolute title in Chinnaya Rao by virtue of S. 28 of the Limitation Act, and that the Dharmakartaship would therefore pass to her personal heirs instead of going to the plaintiffs as reversioners of Jagannatha Rao. The argument is, however, fallacious. Venkatapathi prescribed for only the same title as to Dharmakartaship as to the Chintalapudi Zemindari, *i.e.*, for an hereditary though not absolute estate. In the deed of 1855 it is distinctly referred to by him as an hereditary estate. In his will he made no attempt to alter the course of succession. He gave his wife the Mailavaram estate because " according to the law (Dharma Sastras) the kartaship (heirship) rests in my wife," and he directed her to conduct the Dharmakartaship of the temple. His evident intention was that she should have what the law *gave her—neither more nor less—that is a life estate* in both the properties. So also Venkamma by her gift to Chinnaya in 1877 did not attempt to alter the succession. She gave her both the estate of Mailavaram and the Dharmakartaship " as according to the Hindu Law you are the chief heir after us" to the property. Even therefore if the transfer of the trusteeship to Venkatapathy

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was invalid and even if Venkamma had no power to renounce the trusteeship in favor of Chinnaya it could make no difference in the quality of the interest taken by Venkamma and Chinnaya. Venkamma taking under the will (if it was genuine) could only have the interest which the testator gave her under the will, and Chinnaya taking under the gift could only have the interest which the gift gave her, that is, in both cases, a woman's limited estate under the Hindu Law. Neither Venkamma nor Chinnaya could claim by possession an interest in the property different from what they would have taken if the property had passed by the will or deed, and it is not open to the defendant claiming under them, to claim any higher estate, as observed by *Lopes* L. J. in *Dalton* v. *Fitzgerald*[1] : " If a man obtains possession of land claiming under a deed or will, he cannot afterwards set up another title to the land against the will or deed though it did not operate to pass the land in question, and if he remain in possession till 12 years have elapsed and the title of the testator's heir is extinguished, he cannot claim by possession an interest in the property different from that which he would have taken if the property had passed by the will or deed."

We find, then, that there is no ground on which the defendant can resist the claim of the plaintiffs as reversioners, and we dismiss the appeal with costs.

The memorandum of objections is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Miller.

Sri Rajah Venkata Narasimha Appa Row Bahadur .. Appellant* (*Plaintiff*).

v.

Sree Rajah Suranani Venkata Purshottama Jaghandadha Gopal Row Bahadur and others .. Respondents (*Defendants.*)

Hindu Law—Will—Custom—Appointed daughter—Obsolete.

A Hindu after giving his widow power to adopt by his Will provided as follows : —" If no boy is found and if a daughter has a son that boy becomes a *Dauhitrakarta* according to the Dharmasastras, so that boy alone should become the karta for the entire property belonging to us."

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* A. No. 98 of 1904. 26 February, 1908.

1. (1897) 2 Ch. 86, 93.

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Held :—That the will could be construed as appointing a daughter to raise a son only if there were in existence a living custom to which the words can be referred; and that the language in the will was not such as to indicate the testator's intention to revive a dead custom or create a new kind of heir for himself unknown to the law of the present day.

The onus of proving the existence of the custom is upon the person who relies upon it.

[*Thakur Joobnath Singh* v. *The Court of Wards*[1] referred to.]

Appeal from the decree and judgment of the Court of the Subordinate Judge of Kistna, at Masulipatam, in O. S. No. 1 of 1903.

The facts, the genealogy and the material portions of the will in question are given in the judgments.

T. V. Seshagiri Aiyar and *P. Nagabhushanam* for appellant.

Sir *V. Bhashyam Iyengar*, *V. Krishnaswami Aiyar* and *C. R. Tiruvenkatachariar* for respondents.

T. V. Seshagiri Aiyar for appellant—There are three possible constructions. The *1st construction* of the will is that the testator appoints his daughter Chinnayya to be his heir and to beget a son to succeed to his estate as appointed daughter's son. The *2nd construction* is that the widow of the testator is given a life estate, and after her death the property is to go to the grandson. The *3rd possible construction* is that the widow is to have an estate only up to the birth of a grandson, and then there is a gift over to him. On both the 2nd and 3rd constructions the daughter is excluded.

Sir *V. Bhashyam Aiyangar* for respondent :—Appointment of a daughter is obsolete. The appointed daughter's son becomes the actual son ; so the appointment must be made by the testator in his lifetime and with all rites and ceremonies. The appointed daughter's son becomes the son and belongs to the appointer's *gotram*. Therefore, the plaintiff who belongs to a different *gotram* cannot succeed as the father of the appointed son. The custom, if any, ought to have been specially pleaded.

T. V. S.—I contend that upon the language of the will the grandson becomes an appointed daughter's son—Mayne's *Hindu Law*, 7th Edn., para 76, 78; also Mayne, page 704, 705, para 519.

1 (1875) 2 I. A. 163. S. C. 15 B. L. R. 190.

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The Privy Council does not consider the custom obsolete—*Thakoor Jeebnath* v. *The Court of Wards.*[1] [*Benson* J.—The Privy Council says the custom seems to be obsolete but if any one says he occupies that character he must, in effect, plead it. You have not here pleaded it.]

Sir *V. B.*—referred to *Vasudevan* v. *The Secretary of State*[2]; *Agnithratan* v. *Itticheri*;[3] to show that 'putrika putra' is obsolete.

T. V S.—These cases only show that the Sarwaswadanam marriage is obsolete and not 'putrika putra.' [*Benson* J.—You will go on with the other constructions.]

T. V. S.—2nd and 3rd constructions.—The clause "according to law the *kartaship* rests with our wife" constitutes her *karta.* The previous clause gives the estate to the grandson on the death of the wife, or it can be construed as divesting the wife of the property as soon as he is born. Though no grandson was born to the testator at his death a gift to him is valid—*Yethirajulu* v. *Mukuntha.*[4] Section 100 of the Indian Succession Act is made applicable to Hindus—Illustration (*l*) of S. 100—*vide* Hindu Wills Act. This principle should be made applicable to the mofussil where there is no Hindu law prohibiting gifts to unborn people.

Sir *V. B.*—Even the Hindu Wills Act lays down that the rule should not be applied if it contravenes any rule of Hindu law and the Hindu law prohibits gifts to unborn people—*Tagore Case*.

Sir *V. Bhashyam Aiyangar* for respondent was not called upon to reply.

The Court delivered the following

JUDGMENT:—For the decision of this appeal we have to consider a portion of the will of Rajah Suraneni Jagannatha Lakshma Row, Zeminder of Mailvaram who died on the 31st July 1859. We assume for the purpose of this judgment that the will is genuine, a point which is in dispute.

The important portion is the paragraph numbered I in the translation. It runs as follows:—

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1. (1875) 2 I. A. 163: s. c. 15 B. L. R. 19.
2. (1884) I. L. R. 11 M. 162.
3. (1889) 1 M. L. J. 303.
4. (1905) I. L. R. 28 M. 363.
5. (1872) 9 B. L. R. 377; P. C.

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"We have no male issue; as a suitable boy could not be found among the Jnaties no adoption has been made till now. If our wife Lakshmidevamma Rao, finds a suitable boy among our Jnaties she shall make our adoption according to her will and in accordance with the law. If no boy is found and if our daughter Venkata Chinnaya has a son that boy becomes ('or will become') a dauhitra karta (' daughter's son, heir') according to the law (Dharmasastras): so that boy alone should become the ***karta*** for the entire property belonging to us. According to the law the kartaship rests in our wife: so our funeral rites as well as the acts to be done subsequently should be caused to be done through our wife alone."

The plaintiff is the husband of the testator's daughter Venkata Chinnaya Row who died in 1902 after the death of her two sons. The defendants are sons of the testator's divided younger brother Venkata Gopala Narasimha Rao who died in 1851.

Mr. *Seshagiri Aiyar* on behalf of the appellant contended first that on a proper construction of the will the testator's daughter was appointed by her father to raise a son for him in accordance with a practice which is now generally reported to be obsolete. We need not determine whether in any event the language of the will could be made to bear this construction; it clearly could be so construed only if there were in existence a living custom to which the words can be referred. It is not such language as could be interpreted as indicating the testator's intention to revive a dead custom or create a new kind of heir for himself unknown to the law of the present day supposing him to have the power to do either of those things. It is clearly upon the plaintiff to prove the existence of the custom if he intends to rely on it (vide *Thakur Jeebnath Singh* v. *The Court of Wards*[1]) and he has not taken any issue or otherwise raised the question before the Court of First Instance. It is a question which it may be impossible to decide without an elaborate investigation of the usages and practices of the Velama community, and it is, therefore, not a question which can properly be raised for the first time in the appellate court. In those circumstances, we have declined to hear argument upon the suggested construction of the will. Mr. *Seshagiri Aiyar* then contends that the will confers

1. (1875) 2 I. A. 163 ; 15 B. L. R. 190.

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upon the widow a life estate with remainder to the son of her daughter Chinnaya Rao, or an estate defeasible on the birth of a son to that lady. The fatal obstacle to his success upon this ground, is the fact that neither of the sons of Chinnaya Rao was born in the lifetime of the testator. We are asked to apply to the case the principle enacted in S. 100 of the Indian Succession Act, and transferred from that Act to the Hindu Wills Act, but that section as is pointed out by the learned authors of West and Buhler's *Hindu Law* contemplates a power of disposition of extending further in time than the Hindu Law allows, as by that law some one in existence at the testator's own death must be the ultimate legatee (West and Buhler, 3rd edition, page 224). It is needless, we think, to cite authority in support of this statement of the Hindu Law and we find nothing against it in the judgment of Sir *Subrahmanya Aiyar* in *Yethirajulu Naidu* v. *Mukuntha Naidu*[1] to which our attention was invited. The Hindu Wills Act, assuming that it has altered the law in the case of wills to which it is applicable has, of course, no application to the present case.

The appeal is dismissed with costs.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.]

Present :—Lord Robertson, Lord Atkinson, Lord Collins, Sir Andrew Scoble and Sir Arthur Wilson.

Kalka Parshad and others .. Appellants.*

v.

Mathura Parshad and others .. Respondents.

Kalka Parshad v. Mathura Parshad.

Estoppel—Abandonment of point by advocate—Evidence—Pedigree—Admissibility Evidence Act Ss. 32 cl. 5, 6.

The suit was brought by the sons of the reversioner *S.* of the last male owner *G*, on the death of *G*'s widow M. P., for possession of immoveable property. The last male owner died 40 years before suit, the widow in 1896, and the plaintiffs' father, through whom the plaintiffs claimed, in 1899. The whole question in the case was one of plaintiffs' father's relationship to the last male-holder. The defendant was the nephew of the last male-holder who took possession of the properties on the widow's death. The first Court found that the plaintiffs had proved the pedigrees filed by them and gave a decree. On appeal the Judicial Commissioner held as follows :—"The oral evidence to prove the pedigree in the plaint is, in my opinion, of as little value as the documentary evidence on which the plaintiffs relied ; and at the hearing of the appeal

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* 1908 June 16, 17 and 23, and July 27.

1. (1905) I. L. R. 28 M. 363.

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practically no attempt was made to support the finding of the Subordinate Judge. The only contention was that accepting the pedigree filed by the appellant, *Mathura Parshad*, the plaintiffs are heirs of *G.* as according to it they are *Samanodakas* and, therefore, in the absence of other nearer heirs they exclude the defendant "? and gave a decree for possession of 1/6th of the property on the ground that there were other persons in the same degree of relationship to the last male-owner.

Held (1) that in the circumstances the plaintiffs were not, estopped by what happened before the Judicial Commissioner from attempting to establish that they were the heirs of *G.*

(2) That the pedigrees were not ancient family records handed down from generation to generation and added to, as a member of the family dies or is born, but documents drawn up on a particular occasion for a specific purpose by members of the family, and must accordingly be treated as mere declarations made by the persons who respectively drew up or adopted them;

(3) That the first pedigree, was not shown to have beeen made *post litem motam*, and was, therefore, admissible;

(4) That the second pedigree was on the evidence in the case clearly admissible as a declaration made by a deceased member of a family touching the family reputation or tradition on the subject of its descent and that in order to make the statement inadmissible on the ground that it was made *post litem motam*, the same thing must be in controversy before and after the statement was made ;

[*Freeman* v. *Phillips*[1] ; *Shrewsbury Peerage* [2]; and *Duke of Devonshie* v. *Neill*,[3] followed] and

(6) That the third pedigree was inadmissible, having been made *post litem motam*.

Appeal from a judgment and decree of the Court of the Judicial Commissioner of Oudh (April 17, 1906) reversing a decree of the Court of the Subordinate Judge of Unao (December 16, 1903).

The property in suit belonged to one Gur Shai, who died about 1867; Gur Sahai was succeeded by his widow Musammat Parbati who died on March 22, 1896. After her death the first respondent Mathura Parshad, who was the son of the sister of Gur Sahai took possession of the property, and succeeded in obtaining mutation of names in his favour in the Revenue Court.

On May 20, 1901, the appellants, Kalka Parshad, Durga Parshad and Sunder Lal, instituted the present suit in the Court of the Subordinate Judge of Hardoi to recover possession of the estate of Gur Sahai. The original defendants were the first respondent Mathura Parshad (Defendant No. 1), the second respondent Khan Bhadur Chaudhri Muhammad Nasarat Ali (Defendant No. 2) to whom, it was alleged, that the bulk of the property in suit had been illegally transferred, and defendants No. 3 to 7, to whom,

1. (1816) 4 M. & S. 486, 494-497. 2. (1857) 7 H. L. C. 1, 22.
3. (1876-1877) 2, Ir. L. R. 132. (Common Law.)

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it was also alleged, that portions of the property had been illegally transferred. With the latter the appeal had no concern. They did not attempt to defend the validity of the alienations made to them; a decree was made by the Subordinate Judge against them, and against that decree they did not appeal.

The plaintiffs alleged (*inter alia*) that after the death of Musammat Parbati, their father, one Sheo Sahai, who died on September 22, 1899, was the nearest surviving heir of Gur Sahai, the last male owner of the property, and as such, entitled to obtain possession thereof from the defendants. A pedigree was filed by the appellants to show their alleged relationship.

A written statement in defence was filed by Mathura Parshad, and Chaudhri Nasarat Ali filed a separate written statement. The defences were (*inter alia*) that Sheo Sahai was not the next reversioner, and that other persons claimed title as reversioners who were necessary parties to the suit. Mathura Parshad filed a pedigree, which showed that Gur Sahai was not descended from Partab Mal, son of Chajmal Das, but from another son of Chajmal Das, a younger brother of Partab Mal, named Shiam Das; that Gur Sahai stood in the 15th degree from the common ancestor, Chajmal Das, and Sheo Sahai in the 16th degree; and that the third respondent Sita Ram, the fourth respondent Manohar Lal, the fifth respondent Ram Sahai, and the sixth respondent Gur Parshad, who survived Masammat Parbati were related to Gur Sahai in the same degree as Sheo Sahai. In consequence of the last mentioned plea eleven persons were added as defendants, who alleged that they in varying shares were jointly entitled with Sheo Sahai as heirs of Gur Sahai. Of those eleven persons only four whose names are mentioned above were respondents to the appeal. Thus there were three appellants and six respondents to the appeal.

Of the eleven issues framed by the Subordinate Judge it is necessary to mention here only the following:—(2) Is the genealogical table filed by plaintiffs correct? (3) If so, is Sheo Sahai the nearest heir to Gur Sahai under the Hindu Shastra?

After the evidence both oral and documentary was recorded by the Subordinate Judge of Hardoi; who admitted, among others, the three pedigrees discussed in the judgment of their Lordships, the case was transferred to the Court of the Subordinate Judge of

Unao, who delivered his judgment on December 16, 1903. He found that the appellants had proved the pedigree filed by them; that at the death of Musammat Parbati there was no heir living who was nearer to her husband, Gur Sahai, than Sheo Sahai, the father of the appellants; and that as against the latter the first respondent had no right to the property, and the transfers made by him were clearly invalid. Accordingly, he decreed the claim of the appellants with costs.

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Against that decree the first and second respondents filed one appeal, and the third respondent filed another appeal in the Court of the Judicial Commissioner of Oudh. The two appeals were disposed of by one judgment delivered on September 18, 1905, by two learned Judges. They examined in detail the documentary evidence of the appellants upon which the Subordinate Judge relied, and decided that the greater portion, including the three pedigrees discussed in their Lordships' judgment, was not admissible in evidence. With regard to the oral evidence of the appellants to prove the pedigree filed by them, the learned judges held that it was of as little value as the documentary evidence, and remarked that, at the hearing of the appeal, practically no attempt was made to support the finding of the Subordinate Judge. They were of opinion that the pedigree put forward by the appellants was not proved, but that on the pedigree admitted by Mathura Parshad, the appellants were entitled to succeed to a one-fifth share in the property in suit, the remaining four-fifths vesting in Sita Ram, Ram Sahai, Manohar Lal, and Gur Parshad. Decrees were accordingly made modifying the decree of the Subordinate Judge, and awarding to the appellants a one-fifth share in the estate of Gur Sahai.

On December 16, 1905, the first and second respondents applied to the Court of the Judicial Commissioner for review of its judgment dated September 18, 1905 on the grounds, among others mentioned in their Lordships' judgment. On April 17, 1906, that Court made an order which concluded that "Sheo Sahai, the plaintiffs' father, being sixteenth in descent from the common ancestor, Chajmal Das, was not a *Samanodaka* of Gur Sahai, and was not entitled to succeed to hisproperty as, according to the Mitakshara, the right to succeed depends on propinquity of relationship and the person who is sixteenth from the common

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ancestor can scarcely be said to be a relation at all ; while the sister's son is a *bandhu* the defendant, Mathura Parshad, should be considered as nearer heir than Sheo Sahai." In consequence decrees were made reversing the decree of the Subordinate Judge and dismissing the suit.

Against the four decrees of the Court of the Judicial Commissioner, dated respectively September 18, 1905 (two), and April 17, 1906 (two), the appellants filed four separate applications for leave to appeal to His Majesty in Council, and obtained from the Court of the Judicial Commissioner of Oudh the usual certificate granting such leave in each case. The respondents (No. 3 to 6 inclusive) Sita Ram, Manohar Lal, Ram Sahai and Gur Parshad did not appear at the hearing of the appeal.

De Gruyther, K. C., and *Kyffin*, for the appellants, referred to the Indian Evidence Act (I of 1872), Ss. 11, 32 (5) and (6) and 50, and contended that the pedigrees were admissible under one or other of those sections and the Subordinate Judge was right in admitting them. Those pedigrees established the case of the appellants, and it was submitted that the decree of the Subordinate Judge should be restored. Reference was also made to *Debi Pershad Chowdhry* v. *Rani Radha Chowdhrain*.[1] In any event the appellants were at least entitled to the share awarded them by the decree of the Court of the Judicial Commissioner dated September 18, 1905. Reference was made to Mayne on Hindu Law and Usage (7th ed.) pp. 103 and 679.

Ross, for the first and second respondents, contended that the evidence showed that the dispute really arose in 1891 and in consequence the pedigrees and statements made since that time were not admissible. The Court of the Judicial Commissioner had rightly held that the appellants had failed to prove their case, and its decree dated April 17, 1906 should be affirmed. The plaintiffs were estopped from contending that they were the heirs of Gur Sahai, because they abandoned that part of their case before the lower appellate Court.

De Gruyther, K. C., in reply, contended that looking at all the circumstances of what took place before the lower appellate Court it was impossible to infer that the plaintiffs abandoned their plea that they were the heirs of Gur Sahai.

(1) (1904) L. R. 31 I. A. 150.

The judgment of their Lordships was delivered by

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Lord Atkinson:—The suit out of which this appeal arises was instituted by the appellants, who are the three sons of one Sheo Sahai, deceased, claiming through their father as heirs of one Gur Sahai, deceased, to recover possession of the immoveable property in the plaint described, of which Gur Sahai died possessed about 40 years ago. Gur Sahai was succeeded in the possession and enjoyment of the property by his widow Musammat Parbati, who died on the 22nd March 1896. Sheo Sahai died on the 22nd September 1899.

The principal defendant, the respondent Mathura Parshad, is the nephew of Gur Sahai, his sister's son. He took possession of the property on the death of Musammat Parbati, still retains it, and succeeded in obtaining a mutation of names in his own favor.

Only two questions were discussed on the hearing of the appeal, and it is only necessary for its decision that their Lordships should deal with these. They are :—

1. Is it open to plaintiffs, owing to what took place at the first hearing before the Court of the Judicial Commissioner, to attempt to establish that they are, according to Hindu law, the heirs of Gur Sahai?

2. If it be open to them to do so, is the evidence legally and properly admissible, given before the Subordinate Judge, who tried the case in the first instance sufficient to establish the fact of their alleged heirship?

The course the proceedings took before the Judicial Commissioner is somewhat peculiar. The plaintiffs had, at the hearing, examined several witnesses and given in evidence several pedigrees which, in the opinion of the Subordinate Judge, proved that Gur Sahai and Sheo Sahai were descended from one common ancestor, Partab Mal, son of Chajmal Das, were only seven degrees removed from that ancestor, and that the plaintiffs were, through Sheo Sahai, heirs of Gur Sahai. Mathura Parshad filed a pedigree which shewed that Gur Sahai was not descended from Partab Mal at all, but from another son of Chajmal Das, a younger brother of Partab Mal named Shiam Das, that Gur Sahai stood in the 15th degree from common ancestor, Chajmal Das and Sheo Sahai in the 16th degree; and he contended that under the Hindu Law, heirship did not extend beyond the 14th degree, and that

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therefore he (Mathura Pershad) though only a sister's son, was to be preferred as heir to such remote relations. No evidence whatever was given to prove the latter pedigree. Indeed it was abandoned by the respondents on this appeal, yet the Court of the Judicial Commissioner, finding that it shewed that five other persons stood in the same degree of relationship to Chajmal Das as did Sheo Sahai, held that the Hindu Law permitted them notwithstanding this, to succeed as heirs to Gur Sahai, and gave a decree for possession of one-fifth (not one-sixth as it should have been) of the land, the recovery of which was sought, as the share of Sheo Sahai therein.

Thereupon the defendants Nos. 1 and 2 applied under S. 623 of the Civil Procedure Code for a review of this judgment setting forth amongst other things :—

1. That the Court had held that the pedigrees set up by the plaintiffs were not proved, and that they were, therefore, not exclusively entitled to the property in suit.

2. That the question whether the persons in the 16th degree could be preferred to Mathura Parshad, the nephew, was not allowed by the Court to be fully argued.

On this application the Court of the Judicial Commissioner decided that the Hindu Law forbade, what they had previously decided it permitted, namely, the succession of a person sixteenth in descent from a common ancestor on the ground that he could scarcely be said to be a relation at all ; and that therefore the nephew, Mathura Parshad, should be considered as a nearer heir to Gur Sahai than Sheo Sahai. They accordingly dismissed the plaintiffs' suit with costs. It is to be observed, however, that the Court, in deciding on this application made no reference to the first point which they had decided, *viz.*, that the pedigree set up by the plaintiffs was not proved.

In the first judgment of the Court they state that the finding of the Subordinate Judge that both Gur Sahai and Sheo Sahai were seventh in descent from Partab Mal, had been challenged by the defendant's advocate, who contended that the plaintiffs had failed to prove the pedigree on which they relied, and that all the documentary evidence on which the lower Court based its finding was inadmissible. They then proceeded to devote four pages of their judgment to a minute and critical examination of the

evidence, written and oral, adduced by the plaintiffs, giving their reasons for holding that the documents were inadmissible, and the witnesses unworthy of belief, and they wind up this examination with the passage on which the respondents rely as sufficient to shut out the plaintiff from attempting to sustain the decision of the Subordinate Judge. It runs as follows:—

"The oral evidence to prove the pedigree in the plaint is thus, in my opinion, of as little value as the documentary evidence on which the plaintiffs relied, and at the hearing of the appeal practically no attempt was made to support the finding of the Subordinate Judge. The only contention was that, accepting the pedigree filed by the appellant, Mathura Parshad, the plaintiffs are heirs of Gur Sahai, as according to it they are *Samanodakas*; and, therefore, in the absence of other nearer heirs they exclude the defendant, who is the son of Gur Sahai's sister."

It is inconceivable why the evidence given before the Subordinate Judge should be thus elaborately reviewed, if the plaintiffs' advocate had formally admitted he could not support that Judge's finding. It is almost as strange that this advocate should confine himself to a contention based on a pedigree proved by nobody, and binding upon nobody but the person who filed it, and which, at the best, could only secure to his clients one-sixth of what they sought to recover. It is not less peculiar that the contention which is stated to have been the only contention put forward by the plaintiffs, is the very contention which was conducted in such a fashion that a review was successfully applied for. Having regard to these several matters, it appears to their Lordships impossible to hold that the plaintiffs are, by the statement contained in this paragraph, estopped from endeavouring to sustain, on this appeal, the finding of the Subordinate Judge on this point. The second question, therefore, alone remains for decision.

The plaintiffs gave in evidence at the trial three pedigrees, amongst others, namely (1) a pedigree purporting to have been written by one Maharaj Bahadur in 1872; (2) a pedigree purporting to have been filed by Sheo Sahai in 1892 or 1894 in a civil suit concerning lands other than and different from the lands sued for in this action, in which Sheo Sahai was plaintiff and Kesho and others defendants; (3) a pedigree filed in a suit

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brought for the recovery of the possession of certain lands in which Shankar Sahai (the son of the second defendant) was plaintiff, and Fazal Hussain and others were defendants. The Subordinate Judge though he held—quite rightly, in their Lordships' opinion—that the controversy out of which this appeal has arisen is but a stage in the dispute which arose on the death of Mussammat Parbati in 1896, admitted each of these pedigrees in evidence, and the plaintiff relied strongly upon them. They are not ancient family records handed down from generation to generation and added to, as a member of the family dies or is born, but documents drawn up on a particular occasion for a specific purpose by members of the family, and must, accordingly, be treated as mere declarations made by the persons who respectively drew them up or adopted them. Taking them in the reverse order, the last is inadmissible, having been made *post litem motam.* The second is endorsed: "(Signed) Sheo Sahai, Plaintiff, by the pen of Sunder Lal, Special Agent" and is on the evidence of Sunder Lal clearly admissible as a declaration made by a deceased member of a family touching the family reputation or tradition on the subject of its descent. It was held by the Court of the Judicial Commissioner not to be admissible on the same ground as the third pedigree because, in a statement made by Mussamat Parbati in the absence of Sunder Lal, in a suit instituted by him against her in the year 1891 for cutting down trees in a certain grove in the village of Rampur Ansu, which he alleged was a halting place, she had said:—"I have no kinship with him, nor am I on visiting and dining terms with him as fellow-caste man. He has no concern with my proprietary interest (hakkiat). . . ." The plaintiff's (Sunder Lal's) father, and his co-sharers have wasted their shares in the hakkiat. But it is clear that the controversy to which this statement refers was not a controversy as to the heirship of Gur Sahai but referred to an entirely different matter. In order to make the statement inadmissible on this ground, the same thing must be in controversy before and after the statement is made—*Freeman* v. *Philipps* [1]; *Shrewsbury Peerage* case [2]; *Duke of Deovnshire* v. *Neill.* [3] In their Lordships' opinion having regard to the evidence of Sunder Lal and of the other witnesses examined for the plaintiffs, this pedigree was clearly admissible.

1. (1816) 4 M. & S. 486 and 497.
2. (1858) 7 H. L. C. 1, 22:
3. (1876-77) 2 Ir. L. R. 132 Common Law).

The first pedigree purports to be signed by Maharaj Bahadur, a son of Sheo Narain, a deceased member of the plaintiffs' family who was, however, not examined as a witness. According to the evidence of Ratna Pershad, it was in the hand-writing of the former and was obtained by him from Sheo Narain in the years 1894-96 (the precise date is not fixed) as a statement of the family descent, for the purpose of being given in evidence in certain criminal proceedings instituted under S. 323 of the Indian Penal Code in the case of In re *Baiju and others* v. *Sunder Lal* and *Durga Parshad*. It was thus adopted by Sheo Narain, is not shewn to have been made *post litam motam*, and is, therefore, in their Lordships' opinion, admissible. These pedigrees disclose that Gur Sahai and Sheo Shai are descended from a common ancestor, Partabmal, one of the sons of Chajmal Das, the first through his son, Har Pashad, the second through his son Ram Ghulam, each being six degrees removed from Partab Mal. Six of the many witnesses examined on behalf of the plaintiffs, members of the family, prove descent from this common ancestor. Three of these, namely, Kalka Parshad, Mohabbat Rai and Sunder Lal, prove pedigrees, substantially identical with that signed by Sheo Sahai filed in 1892 or 1894, and others such as Hazair Lal prove important portions of it; while Laltha Parshad, one of the defendant's witnesses deposed as follows:— Kalka Parchad v. Mathura Parshad.

"Sheo Sahai also belongs to the family of Gur Sahai. I have heard that he is also remote by six degrees. In my opinion both (*i. e.*, Matho Ram and Sheo Sahai) are equally related, *i. e.*, in the same degree."

And Sri Kishen, another witness for the defendants, a priest of the family of Sita Ram deposed:—"Sheo Sahai and Sheo Narain descend from Ram Ghulam. Gur Sahai descends from Har Parshad: Ram Ghulam, Har Parshad and Shiam Das are sons of Partab Mal." This evidence precisely accords with the abovementioned pedigrees numbered 1 & 2, proves, in fact, some of the most important steps in them, and is, therefore, the strongest corroboration of them.

Further corroboration of these pedigrees is to be found in the mode in which a certain Mohalla Sarai has been enjoyed. The family reputation is that this Sarai was founded by Sunder Das (one of the brothers of Partab Mal) who died childless. If the

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pedigrees of 1872 and 1894 be correct then half or an 8 anna share in this Sarai, should be found in the enjoyment of the descendants of Partab Mal, and the remaining 8 annas share in the enjoyment of the descendants of Shiam Das, the only brother of Partab Mal who had descendants. That according to the evidence of Raghunath Parshad and Kalka Barshad is precisely what is found. Two annas share was enjoyed by Sheo Sahai, Sheo Narain and Gur Sahai, respectively; a 2 annas share by Sheo Dyal and Ram Dyal (who died childless) jointly and remaining 8 annas by Sitaram Gur Parshad, Ram Narain, Sankar Sahai and other descendants of Shiam Das. The Subordinate Judge points out that had Sheo Sahai and Sheo Narain been descended, as was contended for by the defendants, from Shiam Das and not from Partab Mal the whole 8 annas share for Partab Mal must in the events which have happenned, have come to Mussammat Parbati. Sita Ram, one of the defendants, gives in detail the distribution of an 8 anna share in the Sarai coming into the hands of his branch of the family and states that the Sarai is joint property. No evidence is given to contradict that of Raghunath Parshad and Kalka Parshad as to the persons amongst whom the share of Partab Mal in the Sarai is distributed.

It was argued by Mr. Ross on behalf of the defendants, that the fair conclusion to be drawn from the evidence was that Maharaj Bahadur was either not born in 1872, or was then of such tender years that he could not have drawn up the first pedigree as deposed to by Kalka Parshad. No doubt, there is much force in this argument, but, even if it prevailed, there remains the second pedigree, that of 1892, corroborated as it has been in the manner pointed out.

Their Lordships think that it is impossible to put aside all this evidence as was done by the Court of the Judicial Commissioner. They are, therefore, of opinion that the conclusion at which the Subordinate Judge arrived is that to which the evidence properly admissible, on the whole, most reasonably leads, and that the decision of the former tribunal was erroneous and that its decrees should, therefore, be reversed with costs, and this appeal allowed. They will humbly advise His Majesty accordingly.

The respondents must pay the costs of the appeal.

Solicitors for the appellants : *Young, Jakson, Beard* and *King.*

Solicitors for the first and second respondents : *T. L. Wilson & Co.*

Respondents Nos. 3 to 6 inclusive did not appear.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT OF BOMBAY.]

Present:—Lord Macnaghten, Lord Atkinson, Sir Andrew Scoble and Sir Arthur Wilson.

The Bank of Bombay and another .. Appellants*

v.

Suleman Somji and others .. Respondents.

Bank of Bombay v. Suleman Somji.

Will—Executors and residuary legatees—Equitable mortgage by residuary legatees to secure their business debt—Discovery of the mortgage by the legatees—Mortgagee's duty to investigate the title of the mortgagors—Constructive notice—Priority of legatee's claim over the mortgagee's—Lapse of time—Minority—Possession by residuary legatees not inconsistent with the purposes of the will—Rights of parties.

A mortgage by an executor, who is also residuary legatee, to secure his private debt may be set aside even at the suit of a pecuniary legatee, for the nature of the claims of legatees may be ascertained from the will. But as to creditors it is different. If a reasonable time has elapsed since the death of the testator, and then the executor deals with the testator's estate as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid or that there are other assets for payment of the debts, if any; and the mortgage would be safe as against creditors.

One *S. P.* died on February 15, 1885. He left eight sons, four by his first wife and four by his second wife who survived him. By his will. he left all his property to his elder sons, subject to a charge of Rs. 30,000 in favour of his widow *L.* and his younger sons. The elder sons became indebted to the Bank of Bombay. In 1899, the Bank obtained from them a formal mortgage on the same property, to secure of the repayment of the money due to them. The property consisted of a house and a piece of land, to both of which the mortgagors declared themselves to be entitled, but both of which had been specified by *S. P.* in his will, as subject to the charge of Rs. 30,000 in favour of his widow and younger sons. That will was not among the documents of title deposited with the Bank but the root of the title to the house of *S. P.*, the more valuable of the two properties, was indicated in the will of one *S.* which was deposited; from that it appeared that the house had been the joint property of the two brothers. The Bank's legal advisers made no investigation of the title of the mortgagors, and appeared to have assumed that the mortgagors were the absolute owners of the property mortgaged. It was not suggested that the mortgagors practised any concealment of the real facts of the case Nor was it suggested that the younger sons had any knowledge of the dealings of the elder sons with the Bank.

Their Lordships agreed with both Courts in India in their decision that the legacy under the will in this case was charged upon the property in suit.

Held also that, if the Bank's legal advisers had made any investigation of title, they must have inquired how *S. P's* share had come to the mortgagors, and in that way

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obtained cognizance of his will, and of the charge on that portion of his estate ; that if the mortgagors had been asked about their father's will, it was to be presumed that they would have given an honest answer ; that the mortgagee had constructive notice ; and that the claim of the younger sons of *S. P.* must prevail over the mortgage to the Bank and the title of the transferee.

Held, further that, lapse of time was, no doubt, a circumstance that might be taken into consideration, considering whether the bank was not entitled to assume that the executors were acting with the consent of the legatees, but having regard to the fact that, in the present case two of the younger sons were still minors when the title-deeds were deposited with the Bank and that continued possession by the elder sons was not inconsistent with the purposes of the will, the rights of the parties remained unaffected by that circumstance.

[*In re Quah's Estate*[1] followed. *Graham* v. *Drummond*[2] distinguished.]

Appeal from a decree of the High Court of Judicature at Bombay, Appellate Side, varying a decree of *Chandavarkar* J. made in its Original Jurisdiction

The principal question involved in the appeal was whether the claims of the plaintiff, who were legatees under the will of their father Somji Parpia, had priorty over a mortgage executed in favour of the appellant Bank by the executors and residuary legatees.

The facts relating to the suit were not in dispute. Somji Parpia, a Khoja Mahomedan of Bombay, died on February 15, 1885, leaving him surviving his widow Labai, and eight sons, of whom four were sons of a deceased wife. The four sons of the deceased wife (hereinafter called the elder sons) were Rahimtoola Somji Parpia, the respondent Jaffer Somji, Goolam Hoosein Somji, and the respondent Alladin Somji. The four sons of the widow Labai (hereinafter called the younger sons) were the respondents Suliman Somji, Goolam Ali Somji, Mahomed Somji, and Habib Somji. Of the younger sons Suliman Somji alone had attained the age of majority at the time of the death of Somji Parpia and the rest were minors. Goolam Ali Somji attained the age of majority in 1897, and Mahomed Somji and Habib Somji, who were twins, in 1901. Somji Parpia made his will on February 13, 1885, which was attested on the day of his death. The following were the important clauses of that will:—

1. (1816) 17 L. R. Ir. 361.

2. (1896) L. R. 1 Ch. 968.

" *Clause* 1.—My property consists of my 2 shops for the sale of furniture and other European goods and of a moiety of a house, 1 in number, belonging to me, situated in the Bhajipala Street bearing number * * * and standing in the name of my brother Dhanjibhai Parpia, who is now dead, and of the play-house, situated on the Falkland Road, which is known by the name of the " Elphinstone Theatre" and which now stands in the name of my son Gulam Hoosein Somji. The said properties and the outstanding debts (due to me) in Bombay and at out-stations belong to me. I possess all these properties at present.

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Clause 3.—I bequeath all my above-mentioned property, such as all the goods in the two shops, outstanding debts, claims and debts and the above-mentioned moiety of the house, situated in the Bhajipala Street and the theatre, etc., (*i.e.*) the whole of the (said) property and goods to the sons of my former deceased wife (namely) Rahimtulla, Jafer, Gulam Hoosein and Alladin, 4 persons. None of (my) other heirs has any claim or title thereto. But as to the moiety of the above-mentioned house belonging to me I exclude the right thereto of my elder son Rahimtulla and I reserve the right of my 3 sons only, namely, Jafer, Gulam Hoosein, and Alladin, these three persons to (my) said moiety of the house. To the remaining property the above-mentioned 4 persons are entitled in equal (shares).

Clause 4.—For (my) remaining heirs I order my above-mentioned sons, 4 persons, whose names are Rahimatulla, Jafar, Gulam Hoosein, and Alladin that they shall duly give and act in accordance with what is written below :—

Clause 5.—To my present surviving wife Labai and to her sons named Suliman, Gulam Ali, Mohomed and Habib, my said elder sons, 4 persons, to whom I entrust all my goods and property, shall within 6 years, namely six years after my decease, duly make up and pay Rs. 30,000, namely thirty thousand, to my surviving wife and to her sons. The same shall be paid (to them) in the following manner :—No interest on the said (sum of) money shall be paid up to the above-mentioned period, and up to that period there shall duly be paid Rs. 125, namely one hundred and twenty-five, every month for household expenses and before the above-mentioned sum of Rs. 30,000, namely thirty thousand, is

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fully made up if the betrothal (or marriage *i.e.*) of any son or daughter should take place, then as to the proper (sum of) money that may be required for the expenses thereof the same shall truly be paid out of the (above-mentioned) sum, and when the above-mentioned sum of Rupees thirty thousand shall have been fully made up (and paid) then from that day the aforesaid (sum) of Rupees one hundred and twenty five being the amount of the instalment payable every month for the expenses shall duly cease, that is to say, the same shall not be paid thereafter. Besides this my second surviving wife and her children shall have no manner of right or claim against 4 persons (namely my) sons by my first deceased wife or against my said goods and property in any way whatever.

Clause 6.—As to the (sum of) rupees thirty-thousand directed to be paid out of my above-mentioned goods and property as a share of inheritance by my above-mentioned elder sons, 4 persons, to my surviving wife and her sons mentioned in the 5th clause, I appoint 4 persons as trustees in respect of the said (sum of) money. Their names are Jafar Somji, Gulam Husain Somji, Jafar Ladhabhai Chatu and my second surviving wife. I appoint these 4 persons (as trustees) and I direct them as follows:—The said (sum of) money shall truly be appropriated in accordance with what is written below. Out of the above-mentioned sum of rupees thirty thousand which my elder sons shall pay to my surviving wife and her sons as a share of inheritance the outlays on auspicious and inauspicious occasions, whatever the same may come to—having been deducted, as to whatever sum may remain over, a good "estate" or a house shall be purchased therewith and given (to them). The same shall be purchased in the names of my surviving wife and her sons and given to them; or (the money) shall be deposited at interest at a good place and out of the income that may be realised therefrom, (moneys) shall be paid to my surviving wife during her life-time for her and her children's lodging, food, and clothes and other expenses. And after the decease of my surviving wife when her youngest son shall come of age whatever property there may be (left out) of the said (sum of) Rupees thirty thousand, the same shall truly be divided and given in equal shares to her children.

Clause 9.—I recommend my 4 elder sons mentioned in the 4th clause as follows:—If my second surviving wife and her sons should live in peace and harmony with them (my sons) shall allow them to live in the moiety belonging to me of the said house situated in the Bhajipala Street.

Clause 10.—I recommend my said 4 elder sons to whom I bequeath all my goods and property, shop, &c., as follows:—After my lifetime they shall continue to carry on trade and business in my name and having come to an understanding between themselves and apportioned their respective shares they shall make a writing in respect thereof and shall carry on trade and business in accordance with their own free will and pleasure.

Clause 12.—I nominate or (and) appoint my said four sons named Rahimtulla, Jafer, Gulam Hussain and Alladin, executors of (this) my said will. They shall truly bring into force all the provisions of the said will, and I further direct (my) said executors or my elder sons as follows:—As long as they shall carry on trade and business in my name they shall set apart Rupees 300, three hundred, every year on account of charity and out of the same will they truly give (money) in charity in such manner as they may think proper."

Meenabai, the widow of Dhanji Parpia, the brother of Somji Parpia, died in 1889, leaving a will dated December 18, 1880, by which she gave a legacy of Rs. 200 each to the sons of Somji Parpia other than Rahimtulla, and absolutely bequeathed her husband's half share in the house in Bhajipala Street to Rahimtulla, whom she described in the will as her and her husband's adopted son. A recital in the will was: "and whereas my said late husband Dhanji Parpia had one equal half share or moiety with the said Somji Parpia in the dwelling house or hereditaments and premises bearing No. 9 situate in Bhajipala Street without the Fort in the Island of Bombay and which are registered in the Books of the Collector of Land Revenue and the Collector of Municipal Taxes in the name of my late said husband and are occupied and enjoyed by myself and the said Somji Parpia."

After the death of Somji Parpia the elder sons carried on business at Bombay, Indore, and other places, as contractors for the construction of roads, building, and other works, as co-partners

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under the style or firm of Somji Parpia and Company. The appellants, the Bank of Bombay (hereinafter called the Bank) acted as bankers to the elder sons in the course of such business. On September 1, 1890, the elder sons deposited with the Bank the following deeds and documents as security for advances :—

Deeds relating to a dwelling house in Bhajipala Street.

1. Copy of the will of Meenabai, widow of Dhanji Parpia, dated 18th December 1880.

2. Conveyance dated 12th March 1861 by Khan Mahomed Habibhoy and Karim Khatay to Dhanji Parpia.

Deeds retating to a Theatre in Falkland Road.

1. Copy of lease dated 14th October 1892 by Sha Moolchand Nensey to Goolam Hoosein Somji Parpia.

2. Conveyance dated 26th August 1882 between Peerbhoy Nathoo and Goolam Hoosein Somji.

3. Indenture dated 22nd August 1884 between Javerbai and Goolam Hoosein Somji.

On January 12, 1899, the Bank held thirteen bills of exchange drawn by Somji Parpia and Co., at Bombay on and accepted by Somji Parpia and Co., at Indore, for amounts aggregating together Rs. 52,000, five of which bills for amounts aggregating Rs. 18,500 were then overdue. The Bank called upon the elder sons to pay off those bills of exchange which had fallen due and to find security for the others, and it was ultimately agreed between the parties that the elder sons should find security for the amount of all the bills of exchange in consideration of the Bank agreeing not to enforce payment before October 12, 1899. Accordingly on the same date, *i.e.*, January 12, 1899, the elder sons executed in favour of the Bank a deed of mortgage purporting to mortgage the entirety of the house in Bhajipala Street and the land in Falkland Road with the theatre erected thereon for securing payment of the moneys due and to become due upon the bills of exchange with interest thereon at the rate of 9 per cent. per annum. The mortgage deed recited *inter alia* that the mortgagors were entitled to the entirety of the house in Bhajipala Street and that the mortgagors or one or more of them were also entitled to the land in Falkland Road with the theatre thereon.

From the death of Somji Parpia down to the death of his widow, Labai, she and the younger sons and from her death, which occurred in 1894, until after the institution of the suit the younger sons lived amicably with the elder sons in the house in Bhajipala Street. Jafar Ladhabhai Chatu, one of the trustees also died in 1894. In June 1903 the Bank having, in exercise of the power contained in their mortgage, advertised the sale by public auction of the properties comprised in it, the younger sons gave notice in writing to the Bank that under the will of their father, Somji Parpia, they had a charge on the properties to the extent of Rs. 30,000 and that if the properties were to be sold, they should be sold subject to the charge. The Bank postponed the sale, after having intimated in writing to the younger sons, that the sale was to be of the right, title and interest of the mortgagors, the elder sons.

On September 1, 1903 the younger sons instituted in the High Court of Judicature at Bombay in its Ordinary Original Civil Jurisdiction the present suit against the elder sons and the Bank. The plaint alleged that under the will of their father, Somji Parpia, the property mortgaged by the elder sons to the Bank was charged with the payment Rs. 30,000 and a monthly allowance of Rs. 125 to the plaintiffs and their deceased mother Labai; that divers sums were from time to time paid by the elder sons in respect of the sum of Rs. 30,000 and the monthly allowance of Rs. 125 respectively, but at the commencement of the suit large sums remained unpaid and owing in respect thereof, respectively, and that the Bank took the mortgage with actual or constructive notice of the charge on the properties in favour of the younger sons. The plaintiffs claimed *inter alia* priority in respect of the charge as against the Bank and asked the Court to pass a decree for the due administration of the properties of the deceased Somji Parpia which became vested in the elder sons as his executors and heirs subject to the charge.

By an indenture dated January 14, 1904, the Bank transferred the mortgage to the second appellant, Dwarkadas Dharamsey, for a consideration of Rs. 42,000. Pursuant to an order of the Court Dwarkadas Dharamsey was brought on the record as defendant No. 6.

Rahimtoolla Somji Parkia did not defend the action, and

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the written statement of the others of the elder sons stated among other things that one moiety of the house in Bhajipala Street belonged to the testator Somji Parpia; that the other moiety thereof belonged to his brother, Dhanji Parpia, from whom it descended to his (Dhanji Parpia's) widow, Meenabai, who had bequeathed it to Rahimtulla Somji; and that the mortgage included the land in Falkland Road, on which a theatre had been built, but not the building itself. The Bank and Dwarkadas Dharamasey also filed their written statements. The Court framed the following issues :–

1. What was the property or properties conveyed by the mortgage of 12th January 1899?

2. Whether the plaintiffs have a charge on the property, the subject of the mortgage in the plaint mentioned ?

3. Whether the Bank of Bombay were not *bona fide* transferees for value of the property mentioned in the said mortgage ?

4. Whether the Bank of Bombay had notice of the charge, if any, in favour of the plaintiffs ?

5. Whether the plaintiffs are entitled to the relief claimed or any part thereof ?

6. Whether in any event plaintiffs have any claim to one moiety of the Bhajipala Street property, subject of the said mortgage ?

At the hearing of the suit before *Chandavarkar* J. it was contended on behalf of the younger sons that Meenabai (widow of Dhanji Parkia) had no power to bequeath the moiety of the house in Bhajipala Street, formerly belonging to Dhanji Parkia, and that such moiety descended upon the elder sons and the younger sons in equal shares as heirs of Dhanji Parpia. The learned judge delivered his judgment on August 11, 1904, and held that only three-fourths share of the house in Bhajipala Street was bound by the appellants' mortgage, and the remaining one-fourth did not form part of Somji's estate but belonged to the younger sons in their own independent right as Dhanji Parpia's heirs; that both the land in Falkland Road and the theatre standing thereon were included in the appellants' mortgage; that the younger sons had a charge on the property, the subject of the appellants' mortgage; that actual notice of the will

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of Somji Parpia to the Bank was not proved; that the Bank had constructive notice of that will through Meenabai's will; that according to Indian Law there was no distinction between the powers of an executor over the real property and personal estate of a testator, such as obtained in English Law; that the Bank did not know of the breach of trust on the part of the elder sons and were not a party to their fraud; and that the Bank were *bona fide* transferees for value of the properties comprised in the mortgage. On August 23, 1904, a decree was made to the effect that the Bank had a first charge; that the Bank's security comprised three-fourth parts of the house in Bhajipala Street, and the entirety of the lands and buildings in Falkland Road; that the younger sons were entitled to the remaining one fourth part of the house in Bhajipala Street, and that such right was unaffected by the mortgage; and that they were entitled to a charge for their legacy but ranking subsequently to the Bank's security.

There were two appeals against that decree. The elder sons appealed against the decision to the effect that the mortgage included the building on the land in Falkland Road, and the younger sons appealed against the decision to the effect that the mortgagee had priority over their legacy and monthly allowance. The appellants filed cross-objections by way of cross-appeal. The appellate Court agreed with *Chandavarkar* J., in holding that the younger sons had a charge on the property; that the Bank had constructive notice of the will; and that as regards the law involved there was, according to Indian Law, no such distinction as there was in English law between movable and immovable property, but that the Court held *inter alia* that the elder sons were residuary legatees as well as executors of the testator's will and that the undivided moiety of the house in Bhajipala Street and the entirety of the land in Falkland Road, including the theatre thereon, formed part of the estate of the testator and were, as such, available for the payment of the legacy of Rs. 30,000 and allowance of Rs. 125 per month to the younger sons, in priority to the claim thereon of the Bank under the mortgage of January 12, 1899, and of the Bank's transferee the Appellant Dwarkadas Dharamsey. On March 6, 1905, a decree was accordingly made.

Against that decree the Bank and its transferee, Dwarkadas

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Dharamsey, appealed to His Majesty in Council. The respondents were the younger sons and Jaffer Somji and Alladin Somji, two of the elder sons. Goolam Hoosein Somji died *pendente lite*. The respondents Jaffer Somji and Alladin Somji were not represented at the hearing of the appeal.

Sir *Robert Finlay* K. C., *Levett*, K. C. and *Frank Russell*, K. C. for appellants:—The words "the sum of Rupees thirty thousand directed to be paid out of my above-mentioned goods and property" in clause 6 of the will are only descriptive and create no charge on the testator's estate. For the character and property of an 'executor' as such and his powers and assent to a legacy, reference was made to the Probate and Administration Act (V of 1881), Ss. 24, 90 (as substituted by S. 19 of the Probate and Administration Act, VI of 1889), 113, 115, and 116.

[Sir *Arthur Wilson*: Apart from the Act, the executor of a native has certain powers.]

Levett, K. C.—The Bank obtained the mortgage in good faith and for value from the executors of the will of Somji Parkia, who were also the residuary legatees. Under the Indian Law the executors had power to dispose of, as they thought fit, all property whether movable or immovable vested in them as executors. An executor selling either leasehold or personal estate of his testator is able to give a good title to a purchaser, who purchases without any inquiry whether the debts or legacies charged on the estate are paid or not; and a purchaser or mortgagee from an executor who is also devisee, is neither entitled nor bound to inquire whether legacies or debts charged on the estate have been paid or not:—*In re Whistler.*[1] When the devisee of a real estate charged with the payment of debts, sells, the purchaser has no need to inquire at all whether the money is applied in payment of debts, or whether it is a sale for the purpose of enabling debts to be paid—*Colyer* v. *Finch.*[2] The Bank was entitled to believe that the mortgagors were competent to make a good title to the property mortgaged. The Bank had no notice, actual or constructive, of the existence of any charge in priority to their mortgage; and if an executor, who is also residuary legatee, sells or mortgages an asset of the testator

1 (1887) L. R. 35 Ch. D. 561. 2. (1856) 5 H. L. C. 905.

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for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the assets, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator—*Graham* v. *Drummond*.[1] The Bank is, therefore, entitled to priority, and the fact that the mortgage did not purport to be made by the mortgagors in the capacity of executors but as absolute owners is immaterial—*In re Venn and Furge's Contract.*[2] Reference was also made to Lewin's *Law of Trust*, p. 557 (11th Ed).

The legacy of Rs. 30,000 was to be paid in six years and the will was dated 1885. Six years would expire in 1891 and consequently at the date of the mortgage in 1899 eight years had expired from the time when the legacy was to be satisfied. That circumstance did not exist in the case of *In re Queale's Estate*[3] relied upon by the appellate Court, and distinguished the case under consideration from that case. Assuming notice of the will on the part of the Bank, the Bank after such a lapse of time was entitled to assume that the executors were acting with the consent of the legatees. Consent of the legatees would make the mortgage binding on them with the result that the Bank would be entitled to priority.

Danckwerts, K. C., and *P. S. Stokes*, for respondents, the younger sons.—Both Courts in India had found that the legacy to the younger sons was a charge upon the estate of the deceased. The property bequeathed by the will of the testator to his elder sons was charged with, and was, moreover, held by them upon trust for the payment of the legacy of Rs. 30,000 and the allowance of Rs. 125 per month. As soon as the executors discharged their functions as executors, they became trustees under the will and had no power to convey the property except as trustees. The mortgage to the Bank was, therefore, subject to the trust, *viz.*, the payment of the legacy to the younger sons.

Both Courts in India had found that the Bank had constructive notice of the will of Somji Parpia, and, therefore, the Bank must be treated to have had knowledge of the contents of the will and of the rights of the younger sons thereunder and its title must be postponed to the claims of the younger sons—*Charles Corser*

1. (1896) L. R. 1 Ch. 968, at p. 974. 2. (1894) L R. 2 Ch. 101 at p. 114.
3. (1886) 17 L R. Ir. 361, at p. 368.

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v. *Sidney Cartwright and others.*[1] Meenabai's will, the root of the title of the house in Bhajipala Street, was deposited with the Bank. The defect in the title of the elder sons to the mortgaged property appeared upon the face of the documents of title, and the Bank was guilty of negligence in not calling for and investigating the title of the elder sons to the property comprised in the mortgage and must be held to have taken the mortgage with notice of the will of the testator and its contents. A purchaser or mortgagee is bound to enquire into the title of his vendor or mortgagor, and will be affected with notice of what appears upon the title if he does not so inquire—*Wilson* v. *Hart.*[2] A plea of purchase for valuable consideration, without notice, is no protection against an adverse claim, which the purchaser might have had notice of, by using due diligence in investigating the title—*Jackson* v. *Rowe,*[3] *Jones* v. *Smith,*[4] *Patman* v. *Hart.*[5] Reference was also made to *In re Whistler.*[6]

Both Courts in India have found that the mortgage was given for a pre-existing debt, due to the Bank from the elder sons on account of money borrowed by them from the Bank. The money was borrowed, as the Bank knew, for the personal ends of the elder sons and not in respect of matters or transactions or for purposes authorised by the will of the testator. The mortgage was not, therefore, within the powers of the elder sons, as executors of the testator. The moneys intended to be secured by the mortgage were, to the knowledge of the Bank, applied to the private purposes of the executors. The Bank must be taken to have known, when it accepted the mortgage, that the legacy had not been paid. The elder sons had no right or power to create any charge upon the mortgaged properties, in priority to the claims of the younger sons in respect of their legacy. The will makes the legacy a charge upon the property and there is, therefore, a restriction on the disposal of the property. The elder sons took the property subject to the charge and the Bank could not acquire from them any greater interest than those sons themselves had in the property. On this part of the argument

1. (1875) L. R. 7. Eng. and Ir. App. Cas. 731.
2. (1866) L. R. 1 Ch. App. Cas. 463 at p. 467.
3. (1826) 2 Sim. and St. 472.
4. (1841) 1 Hare 43.
5. (1881) L. R. 17 Ch. D. 353.
6. (1887) 35 Ch. D. 561, 565.

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reference was made to: *Indian Succession Act* (X of 1865) *Ss.* 271 and 187; *Shaik Moosa v. Shaik Essa*[1]; *Probate and Administration Act* of (*V of* 1881), *Ss.* 2, 4, 12 and 90; *In re Kirk*; *Kirk v. Kirk*;[2] *Wigg v. Wigg*[3]; and Rober's *Law of Legacies* (4th Ed.) p. 443.

Levett, K. C., in reply, further referred to *Mead* v. *Lord Berey*[4] and *Taylor* v. *Hawkins*[5].

Danckwerts, K. C., (with their Lordships' permission), with reference to the cases cited in reply, referred to *In re Morgan*: *Pillgram* v. *Pillgram*;[6] and *In re the Alms County Charity*, *Charity Commissioners* v. *Bode*,[7] and contended that if the Bank had inquired, as it was bound to do, it would have known that the legacy, which was a charge, had not been paid. It must be assumed that an honest and not a false answer would have been given.

Their Lordships' judgment was delivered by

Sir Andrew Scoble.—The facts relating to this appeal are not in dispute and may be shortly stated.

Somji Parpia died on the 15th February 1885. He left eight sons, four by his first wife (hereafter called the elder sons) and four (hereafter called the younger sons) by his second wife, Labai, who also survived him. By his will, he left all his property to his elder sons, subject to a charge of Rs. 30,000 in favor of his widow, Labai and his younger sons. Both Courts in India have found that this legacy was charged upon the property in suit and their Lordships agree with this decision.

After their father's death, the elder sons entered upon large business transactions, under the style of Somji Parpia & Co., and in the course of their business became indebted to the Bank of Bombay in respect of advances on bills drawn by the firm in Bombay upon a branch of the firm at Indore. To secure these advances, the elder sons, on the 1st September 1890, deposited certain title-deeds relating to the property in suit, by way of equitable mortgage, with the Bank, and on the 12th January 1899 the Bank obtained from them a formal mortgage of the same

1. (1884) I. L. R. 8 Bom. 241.
2. (1882) L. R. 21 Ch. D. 431, 487.
3. (1739) 1 Atkins 381, 383.
4. (1745) 3 Atkins, 235, at p. 241.
5. (1802) 8 Vesey, 209.
6. (1881) L. R. 18 Ch. D. 93 at p. 102.
7. (1901) L. R. 2 Ch. 750, at p. 762.

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property, to secure the repayment of Rs. 52,000 in respect of bills then due or to become due drawn by the firm on their Indore branch. It is not disputed that this debt was a debt of the four elder sons in respect of their own business, and that the legacy to the widow and the younger sons was at the time, and still is, unsatisfied.

The property comprised in the mortgage consisted of a house in Bhajipala Street and a piece of land in the Falkland Road, in the City of Bombay, to both of which the mortgagors declared themselves to be entitled, but both of which had been specified by their father, Somji Parpia, in his will, as subject to the charge of Rs. 30,000 in favor of his widow and younger sons. This will was not among the documents of title deposited with the Bank, but the root of the title to the house in Bhajipala Street, the more valuable of the two properties, was indicated in the will of Meenabhai, widow of Somji Parpiah's brother, Dhunji Parpia, which was deposited. From this it appeared that the house had been the joint-property of the two brothers, and if the Bank's legal advisers had made any investigation of title, they must have enquired how Somji's shares had come to the mortgagors, and in this way obtained cognizance of his will, and of the charge on this portion of the estate. But they made no enquiry, and appear to have assumed that the mortgagors were the absolute owners of the property mortgaged to them. It is not suggested that the mortgagor practised any concealment of the real facts of the case; and if they had been asked about their father's will, it is to be presumed that they would have given an honest answer.

Nor is it suggested that the younger sons had any knowledge of the dealings of their elders with the Bank. But when the Bank advertised the properties for sale, they filed this suit in order to establish the priority of their charge over the mortgage to the Bank. And the only question in this appeal is whether they are entitled to such priority.

Mr. *Levett* in his able argument for the appellants, contended that under the will of Somji Parpia, the mortgagors were residuary legatees as well as executors, and he relied upon a passage in the judgment of *Romer* J. in *Graham* v. *Drummond*[1] in which that learned Judge says (at p. 974):

1. L R. (1896) 1 Ch. 968.

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"I think it is settled law that if an executor who is also residuary legatee sells or mortgages an asset of the testator for valuable consideration to a person who has no notice of the existence of unsatisfied debts of the testator, or of any ground which rendered it improper for the executor so to deal with the asset, that person's purchase or mortgage is valid against any unsatisfied creditor of the testator."

But this does not dispose of the present case. Here the plaintiffs are legatees, and the distinction between creditors and legatees is well pointed out in Spencer's "Equitable Jurisdiction," Vol. ii., p. 376, where it is said :—

"A mortgage by an executor who is also residuary legatee to secure his private debt may be set aside even at the suit of a pecuniary legatee, for the nature of the claims of legatees, they taking under the will, may be ascertained. But as to creditors it is different. If a reasonable time has elapsed since the death of the testator, and then the executor deals with the testator's estates as his own, the purchaser may, in the absence of notice to the contrary, assume that the debts have been paid, or that there are other assets for payment of the debts, if any; therefore, the mortgagee would be safe as against creditors."

Moreover, in this case the mortgagee had constructive notice, and has only himself to thank if his position is not safe; for had he taken the slightest pains to investigate the title of the mortgagors he must have certainly discovered the charge created by the will of Somji in favour of the widow and her sons.

It was also contended that by the terms of the will the legacy was to be made up and paid within six years after the testator's decease; that the period would have expired in 1891, eight years before the date of the mortgage; and that, assuming notice of the will on the part of the Bank, the Bank was entitled to assume that the executors were acting with the consent of the legatees. Lapse of time is, no doubt, a circumstance that may be taken into consideration in cases of this kind; but having regard to the fact that in this case two of the younger sons were still minors when the title deeds were deposited with the Bank, and that continued possession by the elder sons was not inconsistent with the purposes of the will,

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their Lordships agree with the Court below in holding that the rights of the parties are unaffected by this circumstance.

The case of *In re Queale's Estate* [1] bears a strong resemblance, in its facts, to that now under consideration. There the testator's son deposited with a Bank three leases to secure his own overdrawn account. The Bank dealt with him as absolute owner and eventually proceeded to sell the leaseholds; whereupon the testator's daughters claimed to be placed on the schedule as encumbrancers in respect of unpaid legacies and their claim was allowed. In delivering judgment *Fitz Gibbon* L. J. says:—

"The Bank dealt with him (the mortgagor) as and in his capacity of an individual owner, not an executor, but a person pledging his own property for his own debt, giving as security his own interest for his own purposes. Under such circumstances the Bank can, in my opinion, have no better title than that which its debtor really had in the capacity in which it was dealt with, namely as beneficial owner, *i. e*, residuary legatee."

Their Lordships agree with the learned Judges of the High Court of Bombay that the claim of the first four respondents (the younger sons of Somji Parpia) must prevail over the mortgage to the Bank and the title of its transferee, Dwarkadas Dharamsey, and they will humbly advise His Majesty that this appeal should be dismissed and the decree of the High Court of the 14th April 1905 confirmed. The appellants must pay the costs of the appeal.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Wallis.

Mahadeva Iyer and another .. Plaintiffs (*Appellants*) *

v.

Sankarasubramania Iyer .. Defendant (*Respondent*).

Mahadeva Iyer v. Sankarasubramania Iyer.

Trust—Revocation—Deed—Construction—Construing deed as will.

If an instrument is a deed in form, in order to hold that it is testamentary or in the nature of a will, there must be something very special in the case; and unless there are circumstances which compel the Court to treat an instrument in the form of a deed as a will, the Court will not do so.

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* S. A. No. 540 of 1905. 12th July 1908.

1. 17 L. R. (Ir) 361.

Mahadeva Iyer v. Sankarasubramania Iyer.

[*Patch* v. *Shore* 1 referred to.]

Held also that the settlor of certain properties on certain charitable trusts who appointed himself as hukdar for life and his grandson as hukdar after his death could not, by a subsequent deed, revoke the appointment of his grandson and appoint a stranger.

Second appeal from the decree of the District Court of Tinnevelly in A. S. No. 515 of 1904 presented against the decree of the Court of the Subordinate Judge of Tinnevelly in O. S. No. 27 of 1903.

Sir *V. Bhashyam Iyengar* for appellant.

The Advocate General (*P. S. Sivaswami Aiyar*), *V. Krishnasami Iyer* and *T. Natesa Iyer* for respondent.

The Court delivered the following

JUDGMENT:—By a registered deed, Exh. *A*, one Ponnu Sankara Subbaiyer settled certain immoveable property on certain charitable trusts and appointed himself as hukdar for life and provided that, after his death, his grandson Sankara Subramania Iyer, should succeed him as hukdar, and that such grandson and every successive hukdar should in turn select a successor in like manner. Subsequently, the settlor executed two deeds Exhs. *B* and *C* by one of which he purported to cancel the appointment of Sankara Subramania Aiyar as hukdar, while by the other, he appointed the present plaintiffs. On the settlor's death, the plaintiffs took possession in proceedings under S. 145, Cr. P.C., and then instituted the present suit. The District Munsif decided in his favour, but the lower appellate Court dismissed the suit on the ground that the settlor had no power to revoke the appointment, under Exh. *A*, of the defendant. For the appellant, it is contended that part of Exh. *A* which appoints the defendant must be regarded as being of a testamentary character and so revocable. We are unable to accept this contention. It is not contended that the whole of Exh. *A* is revocable, and we see no reason why one portion of the deed should be held revocable rather than another. Further, it is well settled that if an instrument is a deed in form, in order to hold it testamentary or in the nature of a will, there must be something very special in the case, and that unless there are circumstances which compel the Court to treat an instrument in the form of a deed, as a will, the Court will not do so—*Patch* v. *Shore*.[1] There are no such circumstances in the

1. (1857) 2 Dr. Sm. 589; 32 L. J. Ch. 185.

Mahadeva Iyer v. Sankarasubramania Iyer.

present case. The deed appears to create a vested right in the defendant to take effect in possession on the death of the settlor. The provisions as to the succession after the defendant's death may be open to objection, but this cannot affect the provisions as to the defendant's succession to which no objection can be urged. It was, of course, open to the defendant as to any other trustee to disclaim the trust conferred on him, but he did not do so; and, under these circumstances, we are of opinion that the right to the trusteeship which became vested in him at the date of the deed took effect in possession at the death of the settlor.

The second appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White, *Kt.*, Chief Justice, and Mr. Justice Wallis.

Subramanian Chetty, minor by Minatchi ... Appellant* (*2nd Defendant*)

v.

Veerabhadran Chetty and others .. *Plaintiff and defendants Nos.* 1 *and* 3 *to* 9. (*Respondents & Supplemental Respts.*).

Subramanian Chetty v. Veerabhadran Chetty.

C. P. C., S. 559—"Is interested in the result of the appeal"—Parties, joinder of; in appeal.

The words "intereste in the result of the appeal" in S. 559, C. P. C., have been inserted to protect parties to the suit, who had not been made respondents in the appeal, from being prejudiced by modifications made behind their backs in the decree under appeal.

The party whom it is sought to bring on record is required to be interested in the result of the appeal *before* he is so brought on record.

When a defendant has been exonerated and there is no appeal against so much of the decree as exonerates him, no decree can be passed against him in an appeal by any other party to the suit as he is no party to such appeal, and he cannot be said to be interested in the result of such appeal by another party unless the decree sought to be obtained against the respondent in the appeal would have the effect of prejudicing him in some way or other; and, consequently, the appellate Court cannot make such a person a party to the appeal when the appellant judgment-debtor had impleaded only the decree-holder as party to the appeal.

Second appeal from the decree of the District Court of Madura in A. S. No. 86 of 1904 presented against the decree of the Court of the District Munsif of Tirumangalam in O. S. No. 195 of 1902.

T. R. Ramachendraiyar and *B. Ranganathaiyer* for appellant.

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* S. A. No. 82 of 1905. 7th May 1908.

The Advocate General (*P. S. Sivaswami Aiyar*) for 1st respondent.

Subramanian Chetty v. Veerabhadran Chetty.

L. Narayana Iyer for the supplemental respondents.

The Court delivered the following.

JUDGMENT.—In this case the plaintiff sues to recover possession of certain property usufructurily mortgaged by the 1st defendant to the 6th defendant's grandfather whose interest was subsequently purchased by the plaintiff in execution of a money decree against the 6th defendant's grandfather. In the alternative, the plaintiff seeks to recover the amount of the mortgage debt due on the mortgage by the 1st defendant to the 6th defendant's grandfather. Prior to the purchase in execution by the plaintiff of the 6th defendant's grandfather's interst, the plaint alleges that the 6th defendant's grandfather, for the purpose of defeating the plaintiff's claim against him, got the 1st defendant to execute a collusive mortgage of the same property in favour of the 2nd defendant's father who sued on this mortgage and brought the suit-property to sale when it was purchased by defendants Nos. 3 to 5. The lower appellate Court held that the 2nd mortgage was collusive, but that defendants Nos. 3 to 5 were *bona fide* purchasers for value and gave the plaintiff a personal decree against the 2nd defendant. The 2nd defendant then preferred this second appeal, and the learned Advocate-General who appeared for the 1st respondent (plaintiff) admitted that he could not support the decree against the present appellant, and this second appeal must accordingly be allowed, and the decree of the lower appellate Court modified and the suit against the second defendant dismissed with costs throughout. At the hearing of this second appeal on the 13th November 1907, the Advocate General when admitting that he could not support the decree against the 2nd defendant applied that defendants Nos. 1 and 3 to 9 should be made parties to the second appeal in order to fix them with liability, and the Court on the authorities cited made the order subject to objections. Defendants Nos. 1 and 3 to 9 who have now been made parties, appear and object that S. 559, C P. C., is inapplicable, and that they have been wrongly made parties, and after hearing the question fully argued, we are of opinion that their objection is well founded. S. 559, C. P. C., provides that "if it appear to the Court at the hearing that any person who was a party to the suit in the Court against whose decree the appeal is

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made, but who has not been made a party to the appeal is interested in the result of the appeal, the Court may adjourn the hearing to a future day to be fixed by the Court, and direct that such person be made a respondent."

Looking at the language of the section apart from authority, it would appear to have been inserted to protect parties to the suit, who had not been made respondents in the appeal, from being prejudiced by modifications made behind their backs in the decree under appeal. The party whom it is sought to bring on is required to be interested in the result of the appeal, that is to say, he must be shown to be interested in the result of the appeal before he is brought on, for once he is brought he may be said to acquire an interest as a result of being brought on. Now when a defendant has been exonerated and there is no appeal against so much of the decree as exonerates him, no decree can be passed against him in an appeal by any other party to the suit as he is no party to such appeal, and he cannot in our opinion, be said to be interested in the result of such appeal by another party unless the decree sought to be obtained against the respondents in the appeal would have the effect of prejudicing him in some way or other. This is the interpretation put upon the section in *Atma Ram* v. *Balkishen*[1], where the learned judges say: "We do not think that S. 559 of the Code empowers an appellate Court virtually to make an appeal for an appellant who has refrained from availing himself of his privileges under the law, by introducing for him other respondents than those he has included in his petition of appeal. Moreover, we do not think it can be said that *Atma Ram* was interested in the result of the appeal, as, having the unappealed decree of the Assistant Commissioner behind him, his position was secure. We may further observe that S. 559 was adapted from S. 73 of Act VIII of 1859, and, follows the language of that section, with some modifications. The persons to be brought on under that section were "all the persons who may be entitled to, or who claim some share or interest in the subject-matter of the suit, and who may be likely to be affected by the result," and these persons are described in the marginal note to the section as "parties appearing to be interested in a suit."

In *Upendra Lal Mukerjee* v. *Girindra Nath Mukerjee*[2] a Bench of the Calcutta High Court refused to follow *Atma Ram* v.

1. (1883) I. L. R. 5 A. 267. 2. (1898) I. L. R. 25. C. 565.

Balkishen,[1] and referred to cases such as the present in which the plaintiff having obtained a decree against one of several defendants might well rest content with this decree until the defendant, who had been held liable, preferred an appeal, when he would naturally desire to fall back on his claim against the exonerated defendants in the result of the appeal being successful. In such a case, it would be open to the plaintiff after the filing of the appeal to prefer another appeal against so much of the decree as exonerated any of the defendants, and if his appeal would be out of time there might possibly be ground for excusing the delay. But, however, this may be, the hardships which might arise in a case of this kind is no reason for extending the section to cases which do not come within the scope of the language used in the section as we understand it. We may further observe that the decision in *Upendra Lal Mukerjee* v. *Girindra Nath Mukerjee*[2] was followed with reluctance in *Hudson* v. *Basdeo Bajpye*[3] and was disapproved as to this point by the referring judges in *Rup Jaun Bibee* v. *Abdul Kadir Bhuyan*.[4] It was no doubt held by the Full Bench to have been rightly decided, but no question as to S. 559, C. P. C., was actually before the Full Bench as the appellant had made all the other parties respondents. We have not been referred to any reported case in this Court; and for the reasons already given, we prefer to follow *Atma Ram* v. *Balkishen*[5] and uphold the objection and set aside with costs, the order making defendants Nos. 1 and 3 to 9 respondents to the second appeal

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IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro.

In re Pachappa Chetty .. *Accused* in Calender Case No.* 80 *of* 1908 *on the file of the Sub-Magistrate of Vellore Town.*

Madras Acts—Abkari Act I of 1886, S. 62—Peon—Words—"Abkari officer."

A peon is not an Abkari officer within the meaning of S. 62 of the Madras Abkari Act I of 1886.

In re Pachappa Chetty.

Case referred for the orders of the High Court under S. 438, Criminal Procedure Code, by the District Magistrate of North Arcot in his letter dated 3rd May 1908, Ref. No. 609-C. Mag. of 1908.

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* C. R. C. Nos 252 of 1908. C. R. No. 51 of 1908. 6th August 1908.

1 (1883) I. L. R. 5 A. 267 2. (1898) I. L. R. 25. Cal. 565.

3. (1898) I. L. R. 26 C. 109. 4. (1904) I. L. R. 31. Cal. 613.

5. (1883) I. L. R. 5. A. 267.

In re Pachappa. Chetty.

The District Magistrate's letter of reference ran as follows: —The Sub-Magistrate of Vellore Town convicted two Abkari peons under S. 62 of the Abkari Act (I of 1886) for failure to return to duty after they were discharged from the dispensary where they underwent treatment.

The conviction is illegal since it has been held in Criminal Revision Case No. 435 of 1890 that a peon is not an Abkari officer within the meaning of S. 62 of the Abkari Act I of 1886.

Ag. Public Prosecutor (*K. Narayana Rao*) in support of the reference.

The Court made the following

ORDER:—The peon is not an Abkari officer within the meaning of S. 62 of the Abkari Act (I of 1886). The conviction is set aside and the fine, if paid, will be refunded.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis.

Pannichand and others ... Plaintiffs*

v.

T. Nanoo Sanker Tawker .. Defendant.

Pannichand v. Nanoo Sanker Tawker.

Contract Act, S. 23—Immoral contract—Loan for payment to a dancing girl.

If a creditor advances a loan to the borrower, for and with knowledge of its being applied for an immoral purpose, the contract would be opposed to morality and public policy, and a suit will not lie for the recovery of the loan.

It is immoral for a Hindu to cohabit with a dancing girl, and payments made to a dancing girl with a view to the continuation of the cohabitation are immoral and opposed to public policy; and loans made to enable a defendant to make such payments would be advances for an immoral purpose and cannot be recovered back.

K. Ramachandrier for plaintiffs.

G. Krishnasawmi Iyer with *C. P. Ramasawmi Iyer* for defendant.

The Court delivered the following

JUDGMENT.—This is a suit on a promissory note dated 18th day of September 1905 for Rs. 7,500 with interest at 48 per cent. The note was executed in favor of Koosalji Goolab Chand and the suit is brought in the name of three plaintiffs trading under that name. The defendant put the plaintiffs to the proof of their title to sue, but there is evidence which is uncontradicted that they trade in partnership under that name and have previously sued under it, and the first issue which deals with this point must be found in the plaintiffs' favour. The defendant

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* O. S. No. 18 of 1907. 28th July 1908.

Pannichand v. Nanoo Sanker Tawker.

also pleads that the consideration for the plaint note was immoral, that there was a partial failure of consideration as he received only Rs. 5,000 and not Rs. 7,500, and that having regard to the rate of interest and the defendant's youth and inexperience the transaction was a hard and unconscionable bargain from which the defendant is entitled to be relieved. The burden of proving these issues is, of course, on the defendant. The defendant is a member of the well-known family who carry on business as jewellers in the Mount Road under the style of Tawker and Sons and is a grandson of Ranganath Tawker who is said to be the founder of the firm. According to his own evidence he is now 23 and began to keep a dancing girl, Krishnaveni, five or six years ago, which would be about the date of his attaining majority. He was, therefore, between 20 and 21 at the date of the suit promissory-note. In his examination-in-chief he denied that he had ever borrowed any money before, but in cross-examination he was obliged to admit that he had already borrowed from one Chandick. The two other witnesses who support him are Ragunath and Thangavelu who describe themselves as the brother and the father of the girl, Krishnaveni. The defendant states that he has recently quarrelled with Krishnaveni, but the fact of her father and brother coming to his assistance would seem to show that the quarrel is not a very serious one. This quarrel is put forward to explain why she has not been called. The material witnesses for the plaintiffs are Himmat Mull, the 2nd plaintiff, one Ghulab Chand, a sowcar, living near the 2nd plaintiff, who says he was present when the suit note was executed in the 2nd plaintiff's house in Govindappa Naick Street, and Vinayaga Mudali. This witness is gumastah to Mr. Lakshmana Chetti, a Vakil, who does business for sowcars including the plaintiff and Ghulab Chand, and besides attending to his master's business he acts as a sort of broker introducing clients to sowcars and arranging loans for people he knows if they wanted them. He knew the dancing girl, Krishnaveni, and Thangavelu, her father, he tells us, was a very good friend of his. The defendant stated that he only became acquainted with Vinayaga on the day the promissory note was executed, but on this point I prefer the evidence of Vinayaga who states that he knew the defendant for five or six years. Practically ever since, he lived with Krishnaveni and certainly showed a remarkable acquaintance with the defendant's

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movements and manner of life while he was living with Krishnaveni. He also states that 7 or 8 months before the date of the note he arranged a loan for the defendant, but that the defendant did not want it, whether, as the witness suggests, the defendant had got the money elsewhere or Krishnaveni and her friends had arranged a loan for him which he did not want to reject.

The chief issue in the present case is whether the contract sued on was immoral, and it is quite clear that if the money was advanced by the plaintiffs to the defendant to be applied for an immoral purpose, the contract would be opposed to morality and public policy and the suit will not lie—*Cannan* v. *Bryce.*[1] It is also clear to my mind, though it was disputed by the plaintiffs' Vakil at a very late stage of the case, that it is immoral for a Hindu to cohabit with a dancing girl, and that payment made to a dancing girl with a view to the continuation of the cohabitation are immoral and opposed to public policy, and that loans made to the defendant to enable him to make such payment would be advances for an immoral purpose and could not be recovered back. If the second plaintiff's story that the loan was arranged in the first instance at his ordinary place of business and the money was paid and the note executed there is true, this would go far to prove that he was not sufficiently acquainted with the immoral use to be made of the money to disable him from recovering, especially as he took the precaution to take a receipt from the 1st defendant in which it is stated that the money was borrowed to pay debts and for expenses. On the other hand, if I find that this story is false and that the 2nd plaintiff, instead of waiting for the defendant to come and borrow the money in the ordinary course, went to the dancing girl's house at night, accompanied by her father's good friend, Vinayaka, taking the money with him, and then got the defendant to execute the note and handed over the money to him in the presence of the dancing girl and her friends, such an out-of-the-way proceeding certainly goes to show that he knew the loan was being arranged by Krishnaveni's friends for her benefit, and as there is no suggestion that the defendant was separating from Krishnaveni and giving her money in consideration of past as distinct from future

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1. (1819) 3. B. & Ald. 179.

cohabitation, it would also, in my opinion, follow that he knew the money was to be used for an immoral purpose. This is what happened according to the defendant and his two witnesses, Thangavelu and Ragunathan, who go further and speak to the money being handed over to Krishnaveni by the defendant in the presence of the 2nd plaintiff. The conclusion which I have come to upon the evidence is that the 2nd plaintiff did go with Vinayaga to Krishnaveni's house and that the note was there executed and the money handed over to the defendant in the presence of Krishnaveni and her friends, a receipt, Exhibit *A*, giving numbers of the notes being also taken from the defendant by the 2nd plaintiff. With the exception of a few words in the handwriting of Vinayagam, this list is admittedly in the handwriting of Ragunathan, Krishnaveni's brother, and if the list had been written out at the plaintiff's house it appears exceedingly unlikely that Ragunathan would have been employed rather than one of the plaintiff's own people to write it out. With the exception of the 2nd plaintiff, none of the plaintiff's own people are called to speak to the execution of the note at his house, and it is extremely unlikely that if such an important transaction had taken place at the plaintiff's house, the 2nd plaintiff should alone of his people have been present at it. In addition to the 2nd plaintiff's evidence we have only the evidence of Ghulab Chand and Vinayagam. Ghulab Chand's evidence is very meagre and unsatisfactory, and he did not impress me favourably. He merely happened to be at the plaintiff's house when the note was executed and he does not recollect anything about the numbers of the note being copied out in Ex. *B* which must have taken a considerable time, whereas he says the whole thing was over in about a quarter of an hour. I do not think his evidence can be relied on. Vinayagam's evidence is even more unsatisfactory on this point. Although he says the note was signed in the plaintiff's house, he adds in cross-examination that the counting and such other things took place in Krishnaveni's house, which is inconsistent with the 2nd plaintiff's case which is that neither he nor any one on his behalf went to Krishnaveni's house. In re-examination he said there were two countings, one at the plaintiff's house and the other at Krishnaveni's house, and that on the latter occasion the defendant ticked off the numbers. To tick off the numbers they must have had only the list of numbers, Ex. *B*, which, according to the plaintiffs

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had been left at the plaintiff's house. Realizing his blunder he then said that the defendant noted down the numbers on a piece of paper and did not tick. This was the first suggestion that any such further list had been made, and I do not believe it. On the whole, I have no hesitation in coming to the conclusion that the plaintiff's story as to the place where the note was executed is false, and that the defendant's evidence on this part of the case is true, and further that in view of this finding taken with the rest of the evidence I am warranted in coming to the conclusion that the 2nd plaintiff knew that the money he advanced was to be used for an immoral purpose and that, consequently, the plaintiffs are not entitled to recover. In coming to this conclusion, I rely very much more on the unsatisfactory nature of the evidence for the plaintiffs than on the positive evidence for the defendant, because I am unable to accept the evidence of the defendant and his witnesses on the other part of the case, *viz.*, that after the numbers of the notes for Rs. 7,500 had been taken down in Ex. *B* and it had been signed by the defendant and after the defendant had paid the 2nd plaintiff Rs. 900 in advance for interest and got a receipt for it (Ex. 3) he handed back Rs. 2,500 to the 2nd plaintiff at the 2nd plaintiff's suggestion to keep for him without taking any receipt or acknowledgment. This story is the more absurd as the defendant belongs to a well-known business family and, according to the evidence, has been brought up to take part in the business and would not have been at all likely to behave in so foolish or unbusiness-like a way. I, therefore, find, on the second issue, for the plaintiffs. I also find for the plaintiffs on the fourth issue as to whether the plaint transaction constituted an unconscionable bargain. The rate of interest, 4 per cent per mensem, is no doubt high; but having regard to the suggestions thrown out by the defence in the course of the case that Ragunath Tawker was the founder and proprietor of the firm and that it was not owned by the joint family of which the defendant is a member, I think that if the plaintiffs had obtained judgment they would have been by no means sure of recovering their money and that the transaction was one of considerable risk. In the result, I find for the defendant on the third issue and dismiss the suit but without costs, having regard to the other defences set up.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Sankaran Nair.

Noothi Subbarayadu (deceased) and others .. Appellants* (*Plaintiff and legal representatives of the Plaintiff.*)

v.

Dara Lingayya Garu Suryaprachara-lingam Garu .. Respondent (*Defendant.*)

Subbarayadu v. Lingayya.

Appeal by dead man—Legal representatives brought on record—Delay excused.

An appeal presented on behalf of a deceased party may be bad, but the Court may, in a proper case, treat the appeal as filed on the day on which the legal representatives were brought on record and excuse the delay.

Second appeal from the decree of the District Court of Vizagapatam in A. S. No. 247 of 1904 presented against the decree of the Court of the District Munsif of Vizianagaram in O. S. No. 62 of 1903.

V. P. Ramesam for appellant.

G. S. Ramachandra Aiyar for *V. N. Kuppu Rao* for respondent.

The Court delivered the following

JUDGMENT:—A preliminary objection is raised whether the appeal was filed on behalf of the plaintiff. The plaintiff was dead, and the pleader was not, therefore, entitled to act for him under the vakalatnama in his favor. This may be so. But, in the circumstances of the case, we treat the appeal as having been properly filed when the present appellants, the plaintiff's representatives, were made parties to the appeal, and we excuse the delay under S. 5 of the Limitation Act. On the merits, no question of law arises on the facts found, and we, therefore, dismiss the second appeal with costs.

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*S. A. No. 1492 of 1905 11th March 1908.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present.—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Wallis.

Narayana Mudali .. Appellant* (*Plaintiff.*)

v.

Raghavammal and another .. Respondents (*Defendants*).

Narayana Mudali v. Raghavammal.

Mortgage—Sub-mortgage—Sub-mortgagee's right whether affected by payment by original mortgagor after notice of the sub-mortgage.

The rights of a sub-mortgagee cannot be affected by transactions between the original mortgagee and the mortgagor effected after notice of the sub-mortgage; and the sub-mortgagee who brings a suit on his sub-mortgage and purchases in execution sale the rights of his mortgagor (*i. e.*, the original usufructuary mortgagee in this case) is entitled to possession of the lands and cannot be met in a suit against the original mortgagor for possession by the plea of payment of the original mortgage after the date of the sub-mortgage when the same had not been made before notice of the sub-mortgage.

Second appeal from the decree of the District Court of Chingleput in A. S. No. 193 of 1904 presented against the decree of the Court of the District Munsif, Chingleput, in O. S. No. 181 of 1903.

T. Pattabhirama Aiyar for appellant.

N. Rajagopalachariar for respondent.

The Court delivered the following

JUDGMENT.—In this case the plaintiff obtained a sub-mortgage of the 2nd defendant's interest under a usufructuary mortgage from the 1st defendant of the 12th September 1892. He sued on this sub-mortgage in O. S. No. 6 of 1897 on the file of the District Munsif's Court of Chingleput and on appeal obtained a decree for the sale of the mortgaged property as well as a personal decree. In execution, the land mortgaged to the 2nd defendant under the mortgage of the 12th September 1892 was put up for sale and purchased by the plaintiff and he obtained possession, but was dispossessed under S. 335 of the Civil Procedure Code at the instance of the 1st defendant who alleged that the mortgage had been redeemed. The plaintiff now seeks to recover possession and the District Judge has dismissed his suit on the ground that the plaintiff has failed to prove the sub-mortgage in this suit. The genuineness of the sub-mortgage is not a matter which concerns the 1st defendant. The plaintiff has obtained a decree on it against his mortgagee, the 2nd defendant, and the effect of that decree

* S. A. 264 of 1905. 19th November 1907.

Narayana Mudali v. Raghavamma

was to give the plaintiff a right to sell the interest of the 2nd defendant under the mortgage from the 1st defendant of 1892. This the plaintiff did, and purchased it himself. We think that as the plaintiff in the present suit succeeded in rebutting the 1st defendant's plea that she had redeemed the mortgage of 1892, he is entitled to be restored to possession by virtue of his auction-purchase of the rights of the 2nd defendant under the mortgage of 1892, and that the evidence given in the present case establishes such right. This is, in effect, a suit to set aside the order obtained by the 1st defendant under S. 335 of the Civil Procedure Code, and we think the plaintiff ought not to be debarred from succeeding merely because in his plaint he has mistakenly alleged that he purchased 2nd defendant's interest under a subsequent mortgage of the same lands executed by the 1st defendant in favour of the 2nd defendant in June 1895 whereas his evidence is to show that what he purchased was the right of the 2nd defendant under the mortgage of 1892. For the 1st defendant, it has now been contended that he acquired nothing by his purchase of the rights of the 2nd defendant under the mortgage of 1892, because in consideration of a further advance, the 1st defendant executed the subsequent mortgage of 1895 in favour of the 2nd defendant and the first mortgage was merged in the second. As between the 1st and 2nd defendants, it may be that the earlier mortgage was merged, but we do not think the 2nd defendant, by taking the subsequent mortgage from the 1st defendant, could prejudice the rights of the plaintiff under the sub-mortgage already granted to him, or affect his rights to bring the 2nd defendant's rights under the earlier mortgage to sale and purchase them himself. No doubt, if the 1st defendant had paid the mortgage-debt in whole or in part before notice of the sub-mortgage in the plaintiff's favour she would have been so far discharged, but it is found that she has not paid anything. The sub-mortgage by the 2nd defendant must take precedence over every subsequent interest created by him, and the 1st defendant after notice is bound to have regard to it. We, therefore, set aside the decrees of the lower Courts and declare that the document of the 27th March 1899 is fraudulent, and direct possession of the suit lands to be given to the plaintiff. The appeal is allowed with costs throughout.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Justice Wallis and Justice Munro.

Aiyyam Chetti and others .. Appellants* (*Defendants*).

v.

Poongavanam .. Respondent (*Plaintiff*).

Aiyyam Chetti v. Poongavanam.

Limitation Act, Art. 11—C. P. C., S. 335—Suit by party against whom the order is made—Joinder of strangers as parties after one year, to a suit filed within the year.

The limitation provided for by Art. 11 of the Limitation Act applies to suits under S. 335, C.P. C., only in so far as it is against the person in whose favour the order was made ; consequently the fact that other persons were joined after the limitation period as parties on the representation of the person in whose favor the order was made, that he was only a benamidar for the parties so added, will not bar the suit.

Second appeal from the decree of the Subordinate Judge's Court of Tanjore in A. S. No. 1230 of 1905, presented against the decree of the Court of the District Munsif of Kumbakonam in O. S. No. 352 of 1904.

K. Ramachandra Aiyar for appellants.

T. V. Seshagiri Aiyar for respondent.

The Court delivered the following

JUDGMENT :—The first objection that is taken is that the suit is barred. The auction-purchaser whose possession was resisted by the present plaintiff put in a petition under S. 335, Civil Procedure Code, and obtained an order for delivery of possession to him. The plaintiff then brought this suit against him within the time limited by Art. 11 of the 2nd Schedule of the Limitation Act. In his written statement, the 1st defendant objected that he was only a benamidar—a statement he had made previously in his petition under S. 335, Civil Procedure Code ; and thereupon the Court ordered defendants No. 2 and 3 as the real owners to be made parties, and they were so made parties. This was more than one year after the date of the order under S. 335, Civil Procedure Code, and it is, therefore, contended that the suit is barred.

In our opinion, the suit, which the section provides for, by the party against whom an order has been made under the section is a suit against the party or parties in whose favour the order has been made, and Art. 11 only applies to suits against such parties. The objection is, therefore, untenable. As regards the merits there is evidence to support the finding. The second appeal is dismissed with costs.

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* S. A. 773 of 1906. 9th April 1908.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

East Indian and Anglo-Indian Deposit and Loan Society (Ld) v. T. M. Nair.

Present :—Mr. Justice Benson and Mr. Justice Munro.

The East Indian and Anglo-Indian Deposit and Loan Society (Ld.) .. Plaintiff*

v.

Dr. T. M. Nair and another .. Defendants.

Presidency Small Cause Courts Act. S. 69, Rule 428—Reference to High Court—Question whether cheque has been presented within a reasonable time—Question of fact.

The question whether a cheque has been presented within a reasonable time is a question of fact and consequently not a question upon which the Presidency Small Cause Court can make a reference to the High Court.

The question was to be determined with regard to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case.

Case stated under S. 69 of Act XV of 1882 and Rule 428 of the Rules of Procedure of the Madras Small Cause Court by the Chief Judge of the Madras Small Cause Court in Suit No. 8599 of 1907.

T. Richmond and *A. E. Rencontre* for plaintiff.

J. L. Rosario and *M. Kunjunni Nair* for defendants.

T. Richmond.—The question of reasonable time is a question of fact. S. 74, Bills of Exchange Act (S. 84, Negotiable Instruments Act) alters the rigid rule of common-law ; the result is that it becomes a question of fact. See the difference between Ss. 105 and 106 of the Negotiable Instruments Act. Even otherwise, in England *Serle* v. *Norton*,[1] *Wheeler* v. *Young* [2] are authorities for the view that it is a question of fact. There can be no reference on a question of fact. *Ishwardas Tribovandas* v. *Kalidas Bhaidas*.[3]

J. L. Rosario.—Moule v. *Brown*[4], *Alexander* v. *Bunchfield*[5], *Tindal* v. *Brown*[6], *Darbishire* v. *Parker*[7], all shew that the facts upon which the inference of reasonable time is to be based are for the jury, but the inference from those facts, it is for the judge to make.

The Court made the following

ORDER.—The question whether a cheque has been presented within a reasonable time has to be determined with regard to the

* No. 18 of 1907. 18th March 1908.

1. (1841) 2 Moody and Robinson, 401.
2. (1897) 13 T. L. R. 468.
3. (1896) I. L. R. 20 B. 770.
4. (1838) 4 Bing. N. C. 266.
5. (1842) 7 M. & Gr. 1061
6. (1788) 1 R. R. 171.
7. (1805) 6 East 3.

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nature of the instrument, the usage of trade and of bankers, and the facts of the particular case—S. 84 (2), Negotiable Instruments Act, 1881.

This is the same rule as is laid down in S. 74 (2) of the English Bills of Exchange Act, 1882. The question is, in our opinion, clearly a question of fact, not of law. In England it is held that it is a question of fact for the Jury to determine—*Serle* v. *Norton*[1]; *Wheeler* v. *Young*.[2]

As the question is one of fact, it is not a question which the Small Cause Court can refer for the opinion of the High Court under S. 69 of the Act.

We must, therefore, decline to decide the question. Costs will be provided for by the lower Court's order.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sankaran Nair and Mr. Justice Abdur Rahim.

L. Jogiah and another .. Petitioners* (*Accused*).

In re Jogiah.

Charter Act, S. 15—Letters Patent, Cl. 28 and 29—Power of High Court to stay criminal proceedings taken in consequence of order under S. 476, Cr. P. C—Stay of proceedings pending appeal on the civil side from original decree.

The High Court has power to stay criminal proceedings taken in consequence of an order under S. 476. Cr. P. C.

The power of general superintendence given by S. 15 of the Charter Act includes the power to point out to the Subordinate Courts the inexpediency of trying a case when it is likely to interfere with the due course of justice.

Their Lordships stayed the criminal proceedings in a case taken in consequence of an order by a Civil Judge under S. 476, Cr. P. C. for prosecution for forgery pending an appeal from a final decree of the Civil Court against the finding of forgery.

Petition under S. 15 of the Charter Act and Ss. 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the proceedings of the Sub-Magistrate, Ootacamund, in P. E. No. 1 of 1908.

T. R. Venkatarama Sastri for petitioner.

Ag. Public Prosecutor (*K. Narayana Rao*) for the Crown.

T. R. Venkatarama Sastri :—The High Court has inherent powers to stay proceedings in a criminal case filed under S. 476,

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Cr. Rev. Case No. 193 of 1908. * 11th August 1908.
Cr. Rev. Case No. 137 of 1908.

1. (1841) 2 Moody and Robinson. 401. 2. (1897) 13 T. L. R. 468.

Cr. P. C., pending a civil suit. Under the Charter Act they have got the power. The ruling in the matter of *Ramprasad Hazra*[1] only decides that the Civil Bench has no jurisdiction—*Raj Kumari Debi* v. *Bama Sundari Debi*[2]; *Jadu Lal Sahu* v. *Lowis*.[3] *In re Jogiah*

That there is no revision against orders under S. 476 is no ground for not interfering. *In Gobardhan* v. *Ishwara Chunder*[4] a criminal case launched by the District Registrar was stayed—also *Ramacharan* v. *Emperor*.[5]

Criminal cases ought not to go on pending civil suits as to the same matter—*In re Maharaj*[6] *Anna* v. *Emperor*[7]—though Courts might be reluctant to interfere when the Judge himself acts—*In re Devjivaled Bhavani*.[8]

Ag. Public Prosecutor (*K. Narayana Row*) Contra.—The High Court has no jurisdiction, vide *In the Matter of Ramprasad Hazra*.[1] Even Mr. Justice *Ghose* in *Raj Kumari Debi* v. *Bama Sundari Debi*[2] proceeds upon the view that orders under S. 476 are revisable by the High Court.

In re *Devjivalad Bhavani*[8] it is held that criminal proceedings ought not to be stayed. Even in *Raj Kumari Debi* v. *Bama Sundari Debi*[2] Mr. Justice *Ghose* says that the discretion of the Magistrate ought not to be ordinarily interfered with.

The Court made the following

ORDER :—In a civil suit a document filed by the petitioners was found a forgery, and proceedings have been taken against them under S. 476 of the Criminal Procedure Code. The petitioners have filed an appeal against the decree passed against them in the civil suit in which the main question for determination is whether the document is genuine, and they apply to this Court under S. 15 of the Charter Act to stay further proceedings in the Criminal Courts against them pending the disposal of the appeal.

On a consideration of the circumstances of the case it appears to us that it would be oppressive to the petitioners to allow the

1. (1866) B. L. R. (F.B.) 426.
2. (1896) I. L. R. 23 C. 610, 613.
3. (1907) I. L. R. 34 C. 548.
4. (1900) 5 C. W. N. 44.
5. (1906) 5 C. L. J. 233.
6. (1892) I. L. R. 16 B. 729.
7. (1896) I. L. R. 23 C. 610.
8. (1893) I. L. R. 18 B. 581.

In re Jogiah.

criminal proceedings to be prosecuted as they might thereby be prevented from carrying on the appeal, and as the prosecution was one instituted by a Court, it is probable, in the event of the document being found genuine by the appellate Court, the proceedings against the petitioners might be dropped. There was no suggestion that the petitioners will abscond or be not forthcoming if the finding of the Court as to genuineness is confirmed. We are, therefore, of opinion that further proceedings should be stayed.

It was then argued by the Public Prosecutor that this Court has no power to stay proceedings, and reliance was placed on the case of *In the Matter of the Petition of Ramprasad Hazra.*[1]

It is pointed out in *Jadu Lal Sahu* v. *Lowis*[2] that the Full Bench only decided that under the Code of Procedure then in force the High Court sitting as a Court of Civil Appeal had no power to direct that criminal proceedings ordered by a Civil Court should be stayed. The High Court did not consider the effect of S. 15 of the Charter Act and Ss. 28 and 29 of the Letters Patent.

The power of general superintendence given by S. 15 is not limited by any other provision of law, and it appears to us to include the power to point out to the subordinate Courts the inexpediency of trying a case when it is likely to interfere with the due course of justice. The power of superintendence (S. 15) and transfer (S. 29) implies the power to send for the records in any case in the lower Courts, which must necessarily stay further proceedings in that case.

It appears to us, therefore, that this Court has the power to stay proceedings. The fact that we may not have the power to set aside the order under S. 476, Cr. P. C., is in itself no reason for holding the other way.

The proceedings are stayed, not on the ground that the High Court may ultimately quash the proceedings, but on account of the injustice that may be done to the petitioners in preventing them from prosecuting the appeal.

We, therefore, order the stay of proceedings as prayed for.

[See, however, *Hemchandra Ray* v. *Alat Behari Ray.*[3]—ED.]

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1. (1866) B. L. R. (F. B.) 426 2. I. L. R. (1907) 31 C. 548.
3. (1908) I. L. R. 35 C. 909.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Sankaran Nair.

Olati Pulliah Chetty .. Appellant*

v.

E. Varadarajulu Chetti and others .. Respondents.

Transfer of Property Act, S. 6(a)—Release of Reversioner's right when not a transfer of a chance of succession—Hindu Law—Widow — Compromise of doubtful right—When can be set aside by party. Pulliah Chetti v. Varadarajulu Chetty.

The fact that the right is on the side of one party is not sufficient for the party to set aside a compromise entered into by him on the supposition of a doubtful right.

Held also:—That a release of all claims by a reversioner to an estate held by a widow in recognition of her absolute right to the "estate of the last owner" asserted by her to have been obtained under the will of her husband is not a transfer of "a chance of succession" within the meaning of S 6 (*a*) of the Transfer of Property Act, but is a mere agreement not to disturb the widow in her enjoyment of the property absolutely.

On appeal from the judgment and decree of Mr. Justice *Boddam* in C. S. No. 223 of 1904.

V. Krishnaswami Aiyar and *G. Krishnaswami Aiyar* for appellants.

C. E. Odgers for respondent.

V. Krishnaswami Aiyar:—A previous suit between a widow under whom the defendants claim and the plaintiff's father who was her husband's reversioner ended in a compromise decree giving her an absolute estate in her husband's estate. A razinama decree is no better than a private razinama—*Ramasami Naick* v. *Ramasami Chetty.*[1] Plaintiff's father must be taken, therefore, to have released his *spes successionis* which he had in favour of the widow. Such a release is invalid—S. 6 (*a*) of the Transfer of Property Act; *Sumsuddin Goolam Husein* v. *Abdul Husein.*[2] In this Bombay case, it was also held that this transfer cannot be viewed even as a contract enforceable against the transferor when the estate falls into possession. A compromise is a release of the then existing rights; therefore the transferor cannot be taken to have relinquished his possible future rights as reversioner. Moreover,

* O. S. A. No. 14 of 1906. 26th August 1908.

1. (1907) I. L. R. 30 M. 255, 261. 2. (1906) I. L. R. 31 B. 165.

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it is only a lawful compromise that can be the basis of a compromise decree. Therefore, that portion of the compromise is illegal, even if the compromise be of a doubtful claim, and therefore otherwise valid, *i.e.*, even if the claim in the previous suit be for an absolute estate by the widow, under the will of her father-in-law. The plaint was not for establishing an absolute ownership but only sole ownership (only as widow) of the estate which the defendants were holding as executors along with the widow and to the management of which, she alleged, they had lost all rights by the death of her adopted son for whose benefit alone they were appointed as executors. Therefore there was no doubtful claim to be settled. The meaning of "I give up all my claim to the suit estate" is, I give up those rights that are matured and are then existing. It is a well-known rule of construction that what is not expressly given up is by inference not to be deemed to be given up—*Subbien* v. *Arunachala.*[1] [*Sankaran Nair* J.—Supposing that the widow claimed an absolute estate in the suit and your father thought that she had it and so compromised the doubtful claim, then are you not estopped?] There can be no estoppel, for a compromise is nothing but a transfer, and if we are to uphold the compromise we would be upholding an illegal transfer. [*Sankaran Nair* J.—You are assuming that you had a right in the thing you transferred?] Otherwise, parties can always adopt this mode, *viz.*, of widow claiming absolute estate and the real reversioner giving up his real rights. Unlawful compromises are invalid, *e.g.*, a transfer by compromise of trusteeship of a temple—*Subbarayudu* v *Kotayya.*[2] Transfer of expectancy is invalid—*Narasimham* v. *Madhavarayudu*[3]; *Manickam* v. *Ramalinga*[4]; *Dhoorjeti Subbayya* v. *Dhoorjeti Venkayya.*[5] In the present case there is no compromise of a doubtful claim. There is no claim on the plaint for absolute estate, and no mention of such a claim is made either in the written statement or in the issues. Moreover, as regards this plaintiff, he was not originally a party to the suit. A compromise was first entered into and then he was made a party with a view to make the compromise binding on him. Even a compromise decree, if it embodies an unlawful term

1. (1870) 5 M. H. C. R. 444.
2. (1892) I. L. R 15 M. 389.
3. (1903) 13 M. L. J. 323.
4. (1905) I. L. R. 29 M. 120.
5. (1906) I. L. R. 30 M. 201.

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which under S. 375, C. P. C., cannot be embodied, will not be executed, especially if it contravenes public policy.—*Lukshmanasawmy* v. *Rangamma*;[1] *Raja of Vizianagaram* v. *Dantivada Chelliah*.[2] A compromise is nothing but a transfer, whether it recognizes that a right claimed already existed or that it was doubtful or that it is newly created—*Ram Saryp* v. *Dei*;[3] *Gobind Krishna Narain* v. *Khunni Lal*[4]; *Mahadev* v. *Baldeo*.[5] Doubtfulness of the claim will only be a good consideration for the compromise—*Stapilton* v. *Stapilton*.[6] But if in law and in reality the widow has only a life estate, then, if there be a compromise by which the reversioner really gives up his right, the compromise is invalid as contravening public policy. It will not be valid even as a contract as held by the Bombay High Court in *Sumsuddin Goolam* v. *Abdul Husein*.[7] Moreover, the compromise is said to have been entered into by plaintiff's father when there was a threat of criminal prosecution against him for embezzlement. Evidence as to representations as to stifling prosecution, by the widow, was rejected. This is wrong. Plaintiff also represented that he was to be prosecuted for this. These representations are admissions and are part of *res gestae*. They are admissible. Estoppel must be based upon a representation, but a representation of an opinion does not operate as an estoppel. Whether a widow had an absolute estate under a will is a question of law. There can be an estoppel only as to a statement of fact—*Bigelow* p. 554; *Amir Ali*, 4th Edn. p. 666. There can be no estoppel so as to as alter the existing law of the land or to effect a transfer which cannot legally be done—*Amir Ali* on Evidence 4th Edition p. 644; *Cababe* on Estoppel p. 123, 124. S. 23 of the Contract Act enacts that an illegal contract cannot be enforced

C. E. Odgers for respondent.—There was no pressure by threat of criminal prosecution. The case was pending for two years. There is no evidence that the representations were made by the widow at the time of the compromise. Thay are not *res gestae*. The widow took an absolute estate under the will.

A Hindu reversioner's interest is a vested interest and

1. (1902) I. L. R. 26 M. 31.
2. (1904) I. L. R. 28 M. 84.
3. (1906) I. L. R. 29 A. 239
4. (1907) I. L. R. 29A. 487, 494.
5. (1907) I. L. R. 30 A. 175.
6. (1739) 1 W. T. L.C. 238, 239.
7. (1906) I. L. R. 31 B. 165.

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S. 6 (*a*) of the Transfer of Property Act does not prohibit an alienation thereof. It is only a contingent remainder that cannot be alienated. As to gift to a female, S. 82 of the Indian Succession Act applies. S. 3 of the Hindu Wills Act applies S. 82 to Hindu wills. Unless there is something expressly restricting the interest a person takes, the whole interest is vested—*Bhoba* v. *Peary Lal*[1]; *Tulsi* v. *Muden Gopal*[2]; *Sarod Sundari* v. *Kristo Jiban*.[3]

A compromise of conflicting interests by men who are mutually ignorant of the real facts is binding upon the party to the compromise when he has the means of ascertaining the facts—*Kumar Tarakeswar* v. *Kumar Shoshi Shikhareswar*.[4]

V. Krishnaswami Aiyar in reply :—The question is whether in each case an absolute or limited estate is given. Here, only a limited estate is given. Alienation is prohibited by the will. Rs. 40 for a month for life is given in case the widow does not agree to act up to the previous portions of the will. Even the adopted son of the testator is prohibited from alienating the estate. The words "I give this estate to *A* and his heirs and on the death of *A* to *B*" confer only a life-estate. The daughter-in-law is prohibited from alienating even her jewels. Where there are no express words giving an absolute estate, restraint upon alienation is a circumstance showing that a limited estate alone was given—*Sookhmoy Chunder* v. *Srimati Manohari*[5] a case of bequest to males (nephews); *Kumar Tarakeshwar* v. *Kumar Jhoshi Shikhareswar*[4] also a case of bequest to males; *Siva Rau* v. *Villa Bhatta*[6] a bequest to daughters and to daughters' sons with a clause against alienation. That the property should pass to another in the event of the death of the first grantee is another indication that the gift to him is of a limited estate—*F. Yorke Smith* v. *Tribhuvandas Mangaldas*[7] a case of gift "to *A* and *his* heirs and in case of *A*'s death to others;" *Gosavi Shivgar Dayagar* v. *L. W. G. Rivett-Carnac*:[8] a case of gift to two disciples whom the testator wants to be his heirs, and to one of whom, on attaining the age of 30, one-half

1. (1897) I. L. R. 24 C. 646.
2. (1901) I. L. R. 28 C. 499.
3. (1900) 5 C. W. N. 300.
4. (1883) 10 I. A. 51; 58.
5. (1885) 12 I. A. 103;
6. (1898) I. L. R. 21 M. 425.
7. (1894) I. L. R. 19 B 401.
8. (1888) I. L. R. 13 B. 463, 467.

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of the property was to be handed over with a direction that in case of his death it was to pass to the other; *Gravenor* v. *Watkins*,[1] a gift to mother simpliciter and then on her death to step-father and his heirs with absolute right of disposal provided that the step-father did not alienate it to the father's family who lately treated the testator unkindly. This last was a case of a bequest after the Wills Act which like the Succession Act (S. 82), lays down that a bequest simpliciter confers a fee simple. The decision was that the mother took a life estate only. S. 82 itself applies the rule only "in the absence of a different context." *Bhoba* v. *Peary Lal*[2] cited by the respondent supports my contention, as showing that the context and circumstances to be gathered from the will will control the absolute gift indicated by S. 82. Moreover, a gift to a widow, daughter, son's widow, etc., is, until the contrary is shown, ordinarily a gift for her life—*Kunhacha Umma* v *Kutti Manni Haji*[3]; *Kaliana Sundaram Ayyar* v. *Umamba Bayi Saheb*.[4] As a matter of fact there is no gift at all to the widowed daughter-in-law in the will, and it is only by intestacy that she gets the property. For, the gift, in the first instance, is only conditional, which condition never arose.

The Court delivered the following

JUDGMENT :—The suit was brought by one Olati Pulliah to recover possession of certain properties which belonged to his father's elder brother Olati Lakshmiah. Lakshmiah died in 1892 leaving a will. It is the plaintiff's case that under that will the testator's adopted grandson Kuppiah and his widowed daughter-in-law Ranganaikammal took a joint life interest in the properties left by him, and that on the death of Kuppiah without any issue in April 1893 Ranganaikammal took the whole property only as a tenant for life; that in any event the will did not give her anything more than a widow's estate under Hindu Law; and on her death, therefore, in April 1904, the plaintiff and his deceased father Veeriah became entitled to the property left by Lakshmiah.

The defendants who claim under a will executed by Ranganaikammal answer that it is not open to the plaintiff to rely upon the will as the nature of the interest taken by her under it

1. (1871) L R. 6 C. P. 500.
2. (1897) I. L. R. 24 C. 646.
3. (1892) I. L. R. 16 M. 201.
4. (1897) I. L. R. 20 M. 421.

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was in dispute in a suit brought by her against the plaintiff's father Veeriah to which the plaintiff was also made a party, and the dispute was settled by a *razinamah* between the parties which was embodied in the decree passed in that suit.

They also deny that Ranganaikammal took only a widow's interest as alleged by the plaintiffs. That suit, C. S. No. 124 of 1894, was brought by Ranganaikammal as the "sole owner of the whole" of the testator's property under his will with the exception of a certain portion left for charity, against the plaintiff's father and a son-in-law of the testator who were her co-executors under the will, for a declaration that she had become "solely entitled to and to the possession of the property" and for other reliefs. These defendants denied her claim to the sole ownership. The parties having agreed to settle their disputes, the plaintiff, then a minor, and the daughter of the testator were made parties to the suit, and leave of the Court having been obtained to enter into the compromise on the plaintiffs' behalf, a razinamah was entered into by which the property in suit was acknowledged to be the absolute property of Ranganaikammal in accordance with the terms of the will; she also obtained the right of adoption, and in return she gave the plaintiff and his father a house and a sum of Rs. 3,500, and to the daughter of the testator a house and a sum of Rs. 1,000. She also agreed to pay to the plaintiff, as directed by the will, Rs. 500 for his marriage. A decree was passed in accordance with the terms of the razinamah, and a deed of release was also executed by the plaintiff and his father After the death of Ranganaikammal and his father, the plaintiff now sues to recover possession from the respondents before this Court who claim under a will left by her.

The plaintiff alleged that the razinamah is invalid for misrepresentation and coercion. Mr. Justice *Boddam* disbelieved the evidence to prove the same, and we see no reason to differ from him on that point.

Mr. Justice *Boddam* also held that the estate given to Ranganaikammal by the will was a widow's estate only; if it is open to us to go into that question we should be inclined to take the same view; but we have no doubt that this case is one of compromise of a doubtful right.

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There is a bequest of half the property to Ranganaikammal, and the other half to the adopted grandson Kuppiah Chetty and, on the death of either of them, the survivor was to take that share: and under S. 82 of the Indian Succession Act, Ranganaikammal was, therefore, on the death of Kuppiah Chetti, entitled to take the whole interest of the testator, unless it appeared that only a restricted interest was intended for her. The provision that she was to take in a certain event Rs. 40 *per mensem* for her maintenance and that her jewels were to go on her death not to her heirs but to Kuppiah is, no doubt, a strong indication that the testator intended that she should take only a widow's estate. But in the face of the other provisions referred to, it is impossible to say that the claim was not *bona fide* or that it was frivolous or vexatious.

Ranganaikammal's claim under the will was thus brought into controversy in a Court of Justice; by way of compromise her full ownership was recognized by the plaintiff and his father, who received valuable properties for such recognition. Can they now turn round and repudiate the entire transactions for the purpose of claiming those properties on the ground that she was not the full owner?

As the right must always be on the one side or the other, the fact that the right is on his side is not by itself sufficient for a party to set aside a compromise entered into by him on the supposition of a doubtful right. In the case before us there was no miserpresentation, no surprise. The terms of the compromise were under discussion for many days. Counsel's opinion was taken on both sides. The compromise was sanctioned by Mr. Justice *Subrahmanya Aiyar* in the interests of the plaintiff who was then a minor. About a year after the compromise, the plaintiff and his father executed a release deed in pursuance of its terms; they got a house and a sum of Rs. 3,500 from the widow in consideration of their acknowledgment of her full ownership under the will. She paid another sum of Rs. 1,000 to the daughter as a part of the same transaction. The plaintiff's father never repudiated the transaction, and it is repudiated by the plaintiff only many years afterwards after the widow's death, when it has become impossible to restore the parties to their former position.

Under these circumstances, we have no doubt that the

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plaintiff is bound by the razinamah unless, as contended on his behalf, the razinamah and the decree are illegal and void.

It is argued before us that on the true construction of the will Runganaikammal took only a widow's interest in the property, and as the interest of the plaintiff's father in the property was at the date of the compromise only a chance of succession, the razinamah should be treated as effecting a transfer of such interest to the widow; that such a chance or mere possibility being incapable of transfer by virtue of S. 6 (*a*) of the Transfer of Property Act, such transfer is illegal and invalid, and as the Court cannot empower the parties to do what they are otherwise prohibited from doing on grounds of public policy, the razinamah decree cannot be held to effect such transfer to the widow, and the cases of *Ramasawmy Naicker* v. *Ramasawmy Chetti*,[1] *Nagappa* v. *Venkata Row*,[2] *Lakshmanasawmy Naidu* v. *Rungamma*,[3] and *Rajah of Viziangaram* v. *Dantivada Chelliah*[4] were relied upon.

It will be noticed that the argument proceeds upon the supposition that there was a transfer by the alleged reversioners of their chance of succession.

We are unable to agree to this view. The widow never acknowledged that the plaintiff or any body else had any reversionary interest in the property; she claimed full ownership herself. The plaintiff and his father never purported to convey any interest to her for the very good reason that they admitted they had no reversionary interest.

The razinamah and the decree in terms state that Ranganaikammal is to have absolute powers as regards the estate of the deceased Lakshmiah "which is the absolute property of the plaintiff (widow) in accordance with the terms of the will." These words rebut the idea of any transfer of any reversionary right by the plaintiff and his father by distinctly negativing the existence of any such right in them.

The acceptance of the release deed in this case is not an acknowledgment that any right existed in the releasor. The words in Exhibit *M*, the release deed, on the other hand distinctly allege that the full ownership vested in the widow under the will.

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1. (1907) I.L.R. 30 M. 256.
2. (1902) I.L.R. 24 M. 265.
3. (1902) I.L.R. 26 M. 31.
4. (1904) I.L.R. 28 M. 84.

As Lord *Redesdale* observed in a similar case about a release: "It amounts only to this. I give you so much for not seeking to disturb me."—*Underwood* v. *Courtown* (Lord.).[1] Pulliah Chetti v. Varadarajulu Chetty.

The cases cited, which would only apply if there was a transfer by the reversioners, do not, therefore, apply.

There is, of course, nothing illegal in a widow acquiring full ownership in any property under a will; and a razinamah or decree recognising that right is, therefore, not illegal.

We agree with the learned Judge, therefore, in his view of the compromise and disallow this contention.

The decree is confirmed, and the appeal is dismissed with the costs of the respondents, the Trustees of Pachaiyappa's Charities.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Wallis.

Srinivasa Raghava Dikshidar and others .. Appellants* (*Plffs. and 2nd Plff.'s representaties.*)

v.

Rangasawmi Iyengar and others. .. Respondents (*Defts. No.* 2 to 6.)

Limitation Act, Arts. 113, 116, 83—Suit on covenant—Exchange deed—Indemnity clause, suit on—No suit for specific performance—Cause of action. Srinivasa Raghava Dikshidar v. Rangasawmi Iyengar.

A registered exchange deed provided as follows. "There is no dispute in respect of the said lands. If disputes should arise, the respective party shall be answerable to the extent of his private property." *Held* that a suit on the covenant by one of the parties on dispossession is governed by Art. 116 and not by Art. 113; and that the cause of action arose on the date of the dispossession, the covenant being a special covenant to indemnify, though in the absence of the special contract, the covenant will be a covenant for title, in which case the cause of action would have arisen on the date of the deed.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 538 of 1904 presented against the decree of the Court of the District Munsif of Valangiman in O. S. No. 292 of 1902.

S. Subrahmania Aiyar for appellants.

T. V. Seshagiri Aiyar for 3rd respondent.

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* S. A. 268 of 1905. 7th May 1908.

1. (1804) 2 Sch. and Lefr. p. 68.

Srinivasa Raghava Dikshidar v Rangasawmi Iyengar.

T. R. Venkatarama Sastri for 1st respondent.

S. Rajagopala Aiyangar for 1st and 2nd respondents.

S. Subramania Aiyar for appellants :—Plaintiffs based their first relief upon the special covenants in the deed, and sued for compensation for breach of the covenant. The compensation being based upon a writing registered, the period is six years. This is not a suit for specific performance. The second relief is based upon the statutory right given them by S. 119 of the Transfer of Property Act. The period for enforcing the second relief, *viz.*, recovery of their own lands, is 12 years from the time of dispossession. My right to sue for either of the reliefs arises from the time I was aggrieved, *viz.*, from the time I was dispossessed—*Kasturi* v. *Venkata Subba Mudi*;[1] *Byreddi* v. *Byreddi*;[2] *Veera Pillai* v. *Ponnambala*;[3] *Hari Tiwari* v. *Raghunatha Tiwari*;[4] *Krishnan Nambiar* v. *Kannan*[5]; *Kotappa* v. *Vallur Zemindar*[6]; *Ranga Reddi* v. *Chinna Reddi*[7]; *Subramania Aiyar* v. *Saminatha*.[8]

T. R. Venkatarama Sastri for 1st respondent :—There are four views on any of which the plaintiffs' suit must fail. *Firstly*.—At the time they were dispossessed the plaintiffs had acquired by adverse possession the property dispossessed. They could and should have asserted their claim in that way. They did not do so. They surrendered possession readily without pleading all their defences. *Secondly*.—They did not file a regular suit under S. 283 against the co-parcener urging all their titles to the property. Their present suit could have been avoided if they had *bona fide* pressed all their remedies against the party dispossessing. *Thirdly*.—Damage to the plaintiffs arises out of breach of warranty of title. That breach occurred on and from the date of exchange and not when they were dispossessed. If we had no title to the land the breach of the covenant must be taken to have been from the beginning—*Dart's* Vendors and Purchasers, Vol. II., p. 788; *Hari Tiwari* v. *Raghunatha Tiwari*.[9] *Fourthly*.—The covenant, if any, is one to indemnify for loss. This is specially provided for by

1. (1889) I. M. L. J. 162
2. (1891) I. M. L. J. 479.
3. (1899) 9. M. L. J 137.
4. (1888) I. L. R. 11 All. 27; F.B.
5. (1897) I. L. R. 21 M. 8.
6. (1901) I. L. R. 25 M. 50.
7. (1891) I. L. R. 14 M. 465:
8. (1897) I. L. R. 21. M. 69.
9. (1888) I. L. R. 11 All. 27; F. B.

Srinivasa Raghava Dikshidar v. Rangasawmi Iyengar

Art. 83 of the Limitation Act, which gives only a period of three years—*Bepin* v. *Chunder Sa.*[1] An analogous case is *Viravani Asari* v. *Ponnayya.*[2] This suit might also be viewed as one to enforce specific performance of the contract to indemnify. Then under Art. 113 the period is only 3 years. Art. 116 is inapplicable as my client did not break the contract. It is the co-parcener that dispossessed him.

T. V. Seshagiri Aiyar for 3rd defendant.—The suit, so far as I am concerned is, in any view, not sustainable. No relief is or can be claimed against me.

S. Subramania Aiyar in reply.—This suit is one for compensation for breach of the second covenant, for which Art. 116 alone is applicable. Art. 83 is in respect of contracts not in writing registered.

The Court delivered the following

JUDGMENT:—In this case there had been an exchange of lands between the parties and the exchange deed, Exhibit *A*, which is a registered document, contains the following provisions:—" There is no dispute in respect of the said lands. If disputes should so arise, the respective party shall be answerable to the extent of his private property." The plaintiff was subsequently deprived of some of the land acquired by exchange and brings this suit upon the above covenant more than three but less than six years after the date of deprivation. The lower Courts have dismissed the suit with costs on the fact that it is barred by Art. 113 of the Limitation Act as a suit for specific performance of a contract. It is no doubt true that Art. 116 of the Limitation Act regarding contracts in writing registered does not apply to suits for specific performance of such contracts, but only to suits for compensation for the breach of them. It is, however, well settled that suits such as this for failure to pay money according to contract are to be regarded as suits for compensation for breach of contract and not as suits for specific performance—see *Mitra's* Limitation Act, 4th ed., p. 941, and the authorities there cited. The lower Courts were, therefore, wrong in applying Art. 113 of the Limitation Act to the present case. It is, however, further argued that the provisions above cited amount to a

1. (1880) I. L. R. 5 C. 811. 2. (1898) I. L. R. 22. M. 14.

Srinivasa Raghava Dikshidar v. Rangasawmi Iyengar.

covenant for title and that the breach must be considered to have occurred as and from the date of the deed Exhibit *A* which in this case was more than six years before the institution of the suit. This is no doubt so, in the absence of a special contract—*Dart* on the Law of Vendors and Purchasers, Vol. II., p. 788—but we think that in this case there was a special contract to indemnify the party as and when the deprivation took place. Under Art. 116 of the Limitation Act, read with Art. 83 of the Act, the plaintiff in the present case had six years from the date when he was actually damnified and the suit was within time.

The decrees of the lower Courts must be reversed and the suit remanded to the District Munsif for disposal according to law. Costs will abide the event. As regards the 3rd respondent, the appeal is not pressed and must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Munro and Mr. Justice Abdur Rahim.

P. Rungiah Naidu .. Petitioner.*

v.

C. Rungiah and two others .. Respondents.

Rungiah Naidu v. Rungiah.

C. P. C., S. 622—Applicability to Presidency Small Cause Courts—Presidency Small Cause Courts Act, S. 69—Construction of document—Difference of opinion—Reference—S. 622, C. P. C., applicable to cases decided by the Presidency Small Cause Courts.

Where upon an application to the Presidency Small Cause Court for a new trial, the judges without formally ordering it, heard the whole case and differed on the question of construction of a document (*i.e.*, as to whether a condition formed an integral part of the contract) affecting the merits of the case, *held* that they were bound to refer the question to the High Court and that their judgment was liable to be set aside under S. 622, C. P. C., on that ground.

Petition under S. 622 of the C. P. C. praying the High Court to revise the decision of the Full Bench of the Madras Court of Small Causes in Suit No. 15090 of 1904: F. B. Application No. 46 of 1906.

V. V. Srinivasa Aiyangar for respondent.

T. Narasimha Aiyangar for petitioner.

V. V. Srinivasa Aiyangar took a preliminary objection that no application under S. 622, Civil Procedure Code can be

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* C. R. P. 456 of 1907. 4th September 1908.

Rungiah Naidu v. Rungiah.

entertained by the High Court from the decree of Presidency Small Cause Courts. Till the year 1895, several chapters of the Civil Procedure Code were made applicable to the suits in the Presidency Small Cause Courts, one of which was the revision chapter. After 1895, Act I of 1895 made a difference by taking away the chapter on revision by repealing the original S. 23 of the previous Presidency Small Cause Courts Act. There are rules made by the High Court for the guidance of Small Cause Courts. There is no rule corresponding to S. 622. Moreover, S. 8 of the Civil Procedure Code lays down that only certain sections of the Civil Procedure Code apply to such suits.

T. Narasimha Aiyangar for petitioner:—S. 23, which has been repealed only laid down that certain portions of the Civil Procedure Code are to be applied to the Small Cause Court in the conduct of cases in that Court. That had nothing to do with the powers of the High Court in cases coming before them on revision. By S. 23, even the Small Cause Court may revise its own orders. S. 6 of that Act actually lays down that the Small Cause Courts are subject to the superintendence of the High Court. This section remains intact though S. 23 has been taken away. Under S. 9, of that Act as enacted by Act I of 1895, the High Court was given the power of framing rules for procedure in the Small Cause Courts. As the High Court would frame the necessary rules, S. 23 was repealed. Now the High Court has simply framed certain rules whose wording is exactly the same as that of the sections of the Civil Procedure Code. Moreover, various cases from these Courts have been entertained by all High Courts in revision without any objection. They are also subject to the High Court's superintendence under the Charter Act. S. 622 is very wide.—see *Chaitanna Maitee* v. *Halodhar Maitee*[1]; *Ramakrishna Sitaram* v. *Haji Dawood*[2]; *Ismalji Ibramjee* v. *N. C. Macleod*[3]; *Goudoin* v. *Venkatesa Moodelly*[4]; *Sadasook* v. *Kannayya*[5]; *Seshamniat* v. *Munusami*[6]; *Srinivasa* v. *Balaji*[7]; *Chinnathambi* v. *Veerabhadriah*[8]; *Abraham Pillai* v. *Donald*[9]; *Peary Mohun* v. *Harran Chunder*[10]; *Sasson* v. *Harry Das*[11].

1. (1903) I. L. R. 30 C. 583.
2. (1907) I. L. R. 31 B. 259.
3. (1906) I. L. R. 31 B. 138.
4. (1907) I. L. R. 30 M. 378.
5. (1895) I. L. R. 19 M. 96.
6. (1896) I. L. R. 20 M. 358.
7. (1896) I. L. R. 21 M. 232.
8. (1902) I. L. R. 26 M. 163.
9. (1906) I. L. R. 29 M. 321.
10. (1885) I. L. R. 11 C. 261.
11. (1896) I. L. R. 24 C. 455.

Rungiah Naidu v. Rungiah.

Where there is a difference of opinion among the Judges of the Full Bench relating to the construction of a document, which construction may affect the merits of the case, the Judges must refer the matter to the High Court without finally deciding the case. *Seshammal* v. *Munisami*[1] and S. 69, Presidency S. C. C. Act. There is not a mere refusal to grant a new trial in the case but the Judges considered the merits and came to different conclusions thereon and therefore it is a case for reference under S. 69.

V. V. Srinivasa Aiyangar in reply :—S. 69 will not apply as in effect the Judges refused to grant a new trial. I rely on the cases referred to in *Seshammal* v. *Munisami*.[1]

The Court delivered the following

JUDGMENT :—The petitioner P. Rungiah Naidu sued one C. Rungiah in the Presidency Court of SmallCauses for the recovery of damages for non-acceptance of certain glassware indented for by the latter. The defendant refused to accept the goods on the ground that they were not packed in square and wide cases as required by the indents, contending that the provision as to the mode of packing was an essential term of the contract between him and the plaintiff. The learned Chief Judge who originally tried the suit gave effect to this plea and dismissed the action. The plaintiff thereupon made an application to the Full Bench, which was heard by the Chief Judge and the 2nd and 3rd Judges sitting together. The questions arising in the suit were then fully discussed before them, but they eventually differed among themselves and delivered separate judgments, one Judge holding that the plaintiff's claim should be decreed and the other two being of opinion that the suit should be dismissed. In the result the application was dismissed according to the opinion of the majority.

The petitioner urges that the learned Judges of the Madras Court of Small Causes, having differed as to the proper construction of the indent, were bound to refer the matter to the High Court under S. 69 of the Presidency Small Cause Courts Act and

1. (1896) I. L. R. 20 M. 358.

Rungiah Naidu v. Rungiah.

that they acted without jurisdiction in disposing of the case finally without first obtaining the opinion of the High Court on the point.

The learned pleader for the defendant has taken a preliminary objection to our entertaining the petition under S. 622, Civil Procedure Code, and argues that the section does not apply to a Presidency Court of Small Causes. We think that there is no force in this objection. The Presidency Courts of Small Causes are undoubtedly subordinate Courts, and we can find nothing in the language of S. 622, Civil Procedure Code, or in any other provision in the Civil Procedure Code or the Presidency Small Cause Courts Act, which may be said to indicate an intention on the part of the Legislature to exclude such Courts from the application of S. 622. Further, a series of decisions giving rise to a long course of practice leaves no room for any doubt upon the question. (See *Peary Mohan Ghosaul* v. *Harran Chunder Gangooly* [1]; *Sassoon* v. *Haridass Bhuput*[2]; *Sadasook Gambir Chund* v. *Kannayya*[3]; *Seshammal* v. *Munisawmi Moodelli* [4]; *Srinivasacharlu* v. *Balaji Rao*[5], and *Chinnathambi Moodelli* v. *Veerabudriah Naidu.*[6] The next question we have to consider is whether the learned Judges of the Madras Small Cause Court can be said, in this case, to have sat together in the suit within the meaning of S. 69 of the Presidency Small Cause Courts Act. We find that the Judges sitting in the Full Bench fully dealt with all the points arising for decision in the suit itself, and there can be no doubt that they intended to dispose of the suit finally. If no formal order was made granting a new trial, we agree with the learned Judges who decided the case of *Seshammal* v. *Munisawmi Mudali* [4], that could make no difference. We think we must have regard to the substantial effect of the order and not to its mere form. It virtually amounted to a revival or re-hearing of the suit. That being so, and the learned Judges having taken different views as to the right construction of the indent on the question as to whether the condition regarding the manner of packing was an integral part of the contract or not, and as such construction undoubtedly affects the merits of

1. (1886) I. L. R 11 C. 261.
2. (1896) I. L. R. 24 C. 455.
3. (1895) I. L. R. 19 M. 96.
4. (1896) I. L. R. 20 M. 358.
5. (1896) I. L. R. 21 M. 232.
6. (1902) I. L. R. 26 M. 163.

Rungiah Naidu v. Rungiah.

the case, we are of opinion that they were bound to refer the question to the High Court and could not deal with the case in the way they have done. The order of the Madras Small Causes Court of the 10th March 1907 on the F. B. Application No. 46 of 1906 is, therefore, set aside, and we direct that the suit be disposed of according to law. The costs of the petition will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Miller.

Dorasami Pillai .. Appellant*
(*Plaintiff*).

v.

Angammal and others .. Respondents
(*Defendants*).

Dorasami Pillai v. Angammal

C. P. C. Ss. 28, 45—*Guardian and Ward—Claim against guardian, alienees and others—No misjoinder.*

A ward brought a suit for a declaration that certain alienations by his guardian were not binding against him. He also prayed for a declaration that certain other properties were his, though some of them stood in the guardian's name and some in the names of third parties, having been purchased with his money. The guardian, the alienees as well as the third parties were impleaded in the suit.

Held,—the suit was not bad for misjoinder of causes of action.

Appeal from the decree of the District Court of of South Arcot in O. S. No. 28 of 1903.

The Advocate-General (*P. S. Sivaswami Aiyar*) for appellant.

K. Srinivasa Aiyangar for respondents.

The Court delivered the following

JUDGMENT:—The District Judge has dismissed this suit on the preliminary ground that there is misjoinder of defendants and of causes of action, but he has not stated what the causes of action are which have been improperly joined. We do not think there is any misjoinder. S. 28 of the Civil Procedure Code directs that all persons may be joined as defendants against whom the right to any relief is alleged to exist, whether jointly, severally or in the alternative, in respect of the same matter. In the present suit the cause of action arises from the malversation of the second defendant in regard to the plaintiff's property of which he was the guardian, and the plaintiff's right to have an account of his pro-

* A. No. 198 of 1904. 15th February 1908.

Dorasami Pillai v. Angammal.

perty and to recover it. The allegation in paragraph 11 of the plaint is that the property, items Nos. 1 to 7 in Schedule G, were purchased in the name of the 1st defendant with property which belonged to the plaintiff, and that these items were in the possession of defendants Nos. 1 and 2 and were afterwards wrongfully sold to defendants Nos. 5 to 8, and are now in the possession of defendants Nos. 4 to 8. The right to relief against defendants Nos. 1 and 4 to 8 and against defendant No. 2 and his son, the third defendant, in regard to these items, exists in respect of the same matter, and they may be jointly sued. We think, too, that more inconvenience would result from bringing separate suits than from dealing with the whole mattter in one suit.

We, therefore, set aside the decree of the District Judge and direct him to restore the suit to his file and to dispose of it according to law. Costs will abide the event.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present.—Mr. Justice Benson and Mr. Justice Wallis.

Subbiah Iyer .. .. .. Appellant* (*Plaintiff*).

v.

Subramania Iyer and others .. .. Respondent (*Defendants*).

Subbiah Iyer v. Subramania Iyer.

C.P.C., S. 522, 520—Decree in accordance with revised award—No appeal on the ground that prior remittal was wrong, maintainable.

The provisions of 522, C.P.C., as to appeals from decrees on awards should be strictly construed.

No appeal lies from a decree passed, in accordance with an award revised after remittal of a prior award under S. 520, C P.C., on the ground that the remittal order was erroneous.

Semble.—No appeal lies against decrees passed in accordance with awards on the ground that an order under S. 520, C. P. C, was either improperly made or improperly refused.

Second appeal from the decree of the Subordinate Judge's Court of Tinnevelly in A. S. No. 512 of 1904 presented against the decree of the Court of the Additional District Munsiff of Tinnevelly in O. S. No. 257 of 1903.

S. Muthia Mudaliar for *S. Srinivasa Aiyangar* for appellant:—No appeal to the lower appellate Court lay by virtue of the

* S. A. 1110 of 1905. 7th May 1908.

Subbiah Iyer v. Subramania Iyer.

last clause of S. 522, for the ground on which the decree was set aside was not one which alleged that the decree was in excess of, or not in accordance with, the award. *Ghulam Khan* v. *Muhammad.*[1]

A. S. Balasubramania Aiyar for respondent:—The question is which is the proper award in the case, whether the first or the second. If the order remitting the award is illegal, then the second award is illegal. That is what has been done in the case by the District Court. The Court has to determine whether the first or the second award is legal—*George* v. *Vastian Soury.*[2]

S. Muthia Mudaliar in reply:—The order remitting the award is not appealable independently, if the final decree is not appealable. The decree referred to in the last clause of S. 522 is a decree passed on the final award, for the Civil Procedure Code gives the court power to remit. As there was no award in *George* v. *Vastian Soury*[2], it does not apply.

The Court delivered the following

JUDGMENT :—This appeal raises an interesting question as to which there is apparently no precise authority. The question is, whether after the Court has remitted an award to the arbitrators under S. 520, Civil Procedure Code, and the arbitrators have submitted a revised award and the Court has given judgment under S. 522, Civil Procedure Code, according to the revised award, and a decree has followed thereon, an appeal will lie from such decree on the ground that the order of remittal under S. 520, Civil Procedure Code, was wrong and that the original award ought to have been accepted and acted on. S. 522, Civil Procedure Code, says that no appeal shall lie from the decree so passed except in so far as the decree is in excess of, or not in accordance with, the award, and this, in our opinion, means the award according to which judgment was given, which is, of course, the revised award. The present decree is in accordance with the revised award, and, in our opinion, S. 522, Civil Procedure Code, bars an appeal on the ground that the earlier order of remittal under S. 520, Civil Procedure Code, was wrongly made.

It was not contended that an appeal would lie against a decree passed by the Court in accordance with the award on the

1. (1901) I. L. R. 29 C. 167 and 185 P. C. 2. (1898) I. L. R. 22 M. 202.

Subbiah Iyer v. Subramania Iyer.

ground that the Court had improperly refused an application for an order of remittal under S. 520, Civil Procedure Code, and the policy of the law appears to be to refuse to allow appeals against decrees in accordance with awards on the ground either that an order under S. 520, Civil Procedure Code, was improperly made or improperly refused.

The decision of the Privy Council in *Ghulam Khan* v. *Muhammad Hassain*[1] shews that the provisions of S. 522, Civil Procedure Code. as to appeal must be strictly enforced. The case of *George* v. *Vastian Soury*[2] and the cases there cited are not in point as in each of those cases after the order of remittal under S. 520, Civil Procedure Code, had been made, the arbitrators refused to reconsider their award which consequently became void under S. 521, Civil Procedure Code, and the Court proceeded to try the case and pass a decree in the ordinary way.

The appeal must be allowed and the decree of the Subordinate Judge set aside and that of the District Munsif restored, with costs here and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present.—Mr. Justice Munro and Mr. Justice Sankaran Nair.

Sundarappaiyar and others .. Appellants*
v. (*Defendants*).
Rama Hari Hari Rama Arunachella Chettiar .. Respondent
(*Plaintiff*).

Right of suit—Execution sale of insolvent's properties held after vesting order—Right of purchaser to maintain suit.

Sundarappa Iyer v. Arunachella Chettiar.

An insolvent ceases to have any interest in his properties as soon as a vesting order under S. 7 of the Insolvency Act is made; and an auction-purchaser in an execution sale of the insolvent's interest in certain properties held after the date of the vesting order acquires no interest in the properties.

Appeal from the order of the District Court of Tanjore in A. S. No. 1036 of 1906 presented against the decree of the District Munsif's Court of Shiyali in O. S. No. 161 of 1905.

T. R. Venkatarama Sastri for appellants.

K. Srinivasa Aiyangar for *S. Srinivasa Aiyangar* for respondent.

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* A. A. O. No. 232 of 1907. 26th July 1908.

1. (1901) I. L. R. 29 C. and 185 P. C. 2. (1898) I. L. R. 22 M. 202.

Sundarappa Iyer v. Arunachalla Chettiar.

T. R. Venkatarama Sastri :—I submit the respondent is not entitled to maintain the action. After the date of vesting order in insolvency the property of the insolvent, present and future, becomes vested in the Official Assignee under S. 7 of 11 & 12 Vict., Cap. 21. But a distinction has judicially been made between property already vested in the insolvent and property which would become his in the future; for the future property must at least for a moment vest in the insolvent before it can pass on to the Official Assignee. The insolvent can, after the vesting order, sue for property which thereafter comes to him by inheritance, etc.—*Sriramulu Naidu* v. *Andalammal.*[1] The insolvent can, after the vesting order, sue and recover property against all the world except the Official Assignee, if the latter does not intervene. But the property in this case is one which vested in the insolvent before the vesting order, and none but the Official Assignee can sue to recover the same—*Sadodin* v. *W. Spiers*[2]; *Daniel Beckham* v. *William Walker Drake*[3]; *Marwick* v. *Hardingham*[4]; *Rowlandson* v. *Champion.*[5]

K. Srinivasaiengar :—The vesting under S. 7 is for the purpose of distribution in favour of the creditors. If the Official Assignee does not intervene, and if the creditors do not object, the insolvent can maintain a suit and recover all property which has not *actually* vested in the Official Assignee. Similarly, he can alienate such property. The question of the right of the alienee as against the Official Assignee need not be considered in this case. 'Vesting' is only for a limited purpose *i.e.*, for paying off the creditors. If all the creditors are paid, the remainder of the property in the Official Assignee's hands must be handed over to the insolvent. Therefore, whatever be the nature of the property, *i. e.*, whether existing before or acquired after the vesting order, the insolvent is not deprived of the right to sue altogether—*Cumming* v. *Roebuck* [6] (a case of after-acquired property.) So long as the Official Assignee is not prejudiced, the insolvent or his alienee has got the right to sue, though the property was one which existed previously to the vesting order.—*In re New Land Development Association and Gray.*[7] Moreover the

1. (1906) I. L. R. 30 M. 145.
2. (1879) I. L. R. 3. B. 437.
3. (1849) 9 E. R. 1213.
4. (1880) 1 Sc. D. 339.
5. (1893) I. L. R. 17 M. 21.
6. (1816) Holt (C. P.) 172.
7. (1892) 2 Ch. 138.

right of the insolvent in the property was joint with that of others. He gets a specific right therein only after partition which did not take place till after the vesting order. It is not an 'estate' within the meaning of S. 7. *Sadodin* v. *W. Spiers* [1] is against me. [*Sankaran Nair* J.—Is not *Ram Soondur Dey* v. *Shoshimohun Pal Chowdhry*[2] against you?] No. The point was not decided; but the judges refused to force a doubtful title upon the purchaser.

Sundarappaiyar v. Arunachella Chettyar.

T. R. Venkatarama Sastri in reply.—*Ram Soonder Dey* v. *Shoshimohun Pal Chowdry* [2] is certainly against the respondent, for under S. 331, Civil Procedure Code, the Judges had to find that the insolvent had no interest in the property after the vesting order before they could set aside the sale. Undivided property is an estate—*Rangayya Chetty* v. *Thanickachala Mudali*,[3] *Fakirchand Motichand* v. *Motichand Hurruck Chand*,[4] *Nunna Brahmayya* v. *C. Venkatasamy*.[5]

The Court delivered the following

JUDGMENT:—A simple money decree was obtained against the 1st defendant, and in execution thereof the 1st defendant's undivided one-fourth share in certain immoveable property was sold and purchased by one Velayappa Chetty who conveyed his right to the plaintiff. The plaintiff now sues for partition and possession of the share. Prior to the execution sale the 1st defendant had become an insolvent and all his property, including the share now in question, had vested in the Official Assignee under S. 7 of the Indian Insolvent Debtors Act, 11 and 12 Victoria, Chap. 21. The question for decision in this appeal is whether the plaintiff has any interest which entitles him to maintain the suit. In *Ram Soondur Dey* v. *Shoshimohun Pal Chowdry* [2] it was held that where an order has been made under S. 7 of the Indian Insolvent Debtors Act vesting the property of a judgment-debtor in the Official Assignee the judgment-debtor has no saleable interest in such property. In *Sadodin and another* v. *W. Spiers*[1] it was laid down that as soon as an order under S. 7 is made any rights of property which an insolvent may have possessed at the date of his petition in insolvency vest in the Official

1. (1879) I. L. R 3 B. 437.
2. (1882) 11 C. L. R. 389.
3. (1896) I. L. R. 19 M. 74.
4. (1883) I. L. R. 7. B. 438
5. (1902) I. L. R. 26 M. 214.

Sundar-appaiyar v. Arunachella Chettyar.

Assignee who alone can maintain a suit to enforce such rights. These decisions give effect to what we think is the plain meaning of S. 7, and they are exactly applicable to the present case. If they are followed, the plaintiff cannot maintain this suit, as nothing passed by the execution sale. It has no doubt been held—vide *Sriramulu Naidu* v. *Andalammal*[1]—that in the case of property acquired after his insolvency an insolvent may, in certain circumstances, maintain a suit. But *Sriramulu Naidu* v. *Andalammal*[1] and the decisions which it follows are no authority with regard to the property possessed by the insolvent at the time of his insolvency as in the present case. We hold, therefore, that the plaintiff cannot maintain this suit. The decree of the District Judge is set aside and that of the District Munsif restored with costs in this and in the lower appellate Court.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present.—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Abdur Rahim.

Palani Kumarasawmi Pillai and another .. Appellants in both* (*Defendants*).

v.

S. Udayarnadan and others .. Respondents in both (*Plaintiffs*).

Kumarasawmi Pillai v. Udayarnadan.

Civil Procedure Code, Ss. 491, 483 & 561—General damages in suit for compensation for wrongful attachment before judgment, awardable—Memorandum of Objection not moved—Jurisdiction to dismiss the Memorandum with costs.

General damages are recoverable in a suit for compensation for wrongful attachment before judgment. Courts have jurisdiction to *dismiss* a memorandum of objections not stamped and, therefore, not moved, and to dismiss it with costs also.

Second appeals from the decree of the District Court of Tinnevelly in A. S. Nos. 544 and 545 of 1904, respectively, presented against the decree of the Subordinate Judge's Court of Tuticorin in O. S. No. 28 of 1903.

Sir *V. Bhashyam Aiyangar* and *T. V. Muthukrishna Aiyar* for appellants.

P. R. Sundara Aiyar and *A. S. Balasubrahmania Aiyar* for respondents.

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* S. A. Nos. 1431 and 1432 of 1905. 23rd September 1908.

1. (1906) I. L. R. 30 M. 145.

Sir *V. Bhashyam Aiyangar*:—The question in this case is whether there was sufficient cause for applying for attachment before judgment. The Civil Procedure Code, S. 491, last clause, says that an award of compensation shall be a bar. If there is no award made, either as the result of a full investigation into the matter or as the result of an order directing the party to go to a regular suit, then a regular suit for compensation is not barred. In a regular suit the considerations mentioned in S. 491 are not the only considerations. The point to be determined by a regular suit is whether there was reasonable and probable cause for instituting the suit and for the attachment before judgment—see S. 483, Civil Procedure Code. Though the application for attachment before judgment can be only after the filing of the suit, the attempted disposal of property might be before suit. This is a case in which a disposal of property had already been made before the suit money was due on the disposal; and that money itself would constitute a debt in his favour until it is paid to him. There was a prohibitory order as regards the money; but the so-called debtor came and represented to the Court that no money was due and that it was already fully paid. The allegation in the case is that the other side had been clearing quickly his stock of goods and that he had been quickly collecting the outstandings. The first part might come under S. 483 and not the second. The source of information for my client for applying for attachment was not stated in the affidavit, ; it appeared only in the course of the present case. *Secondly*, in an action of this kind, as distinguished from actions for malicious prosecution, only actual damages can be recovered and not general damages for loss of reputation—*Pollock* on *Torts*, p. 614, 7th Edn. S. 43 of the Civil Wrongs Bill—note of Pollock—says that special damage must be always shown; Pollock pp. 310, 311. *Bigelow* in his *Leading Cases on Torts*, p. 206, says that in such cases malice and special damage must be proved. If the gist of the action is special damage, general damages cannot be given as in the case of some kinds of slander. [*Chief Justice*:—These show that in the absence of special damage no suit can be maintained. Are there any authorities that general damage besides special damage cannot be recovered?] There are none either way—*Raj Chunder Roy* v. *Shama Soondari*[1] throws some light.

1. (1879) I. L. R., 4 C. 583.

Kumarasawmi Pillai v. Udayarnadan.

P. R. Sundara Aiyar—who was asked to reply only on the question of damages:—The ground on which an application for attachment before judgment is made is one which attributes improper conduct to the defendant; that certainly would affect his credit, especially if he is a merchant. The allegation isthat he will defeat his creditors. Special damage is opposed .to nominal damage. *Quartz Hill Gold Mining* v. *Eyre*[1] shows that such application would by itself injure the credit of the defendant. S. 491 also refers to improper arrest, and there could be no special or pecuniary damage by arrest in many of such cases. Yet, the section allows compensation, showing thereby that general damages can be recovered. *Raj Chunder Roy* v. *Shama Soondari*[2] does not apply as it was not a case of attachment before judgment.

P. R. S. Aiyar. On the question of costs in the Memo of Objections:—When the respondent does not move the memorandum of objections there is nothing judicially before the Court, and so costs need not be paid thereon to the other side. There is no jurisdiction for the Court to deal with the memorandum of objections—S. 561, Civil Procedure Code. [*C. J.*—You have *filed* the memorandum and you have given notice to the other side.] A memorandum need not be stamped at the time of filing—S. 16 of the Court Fees Act. I have not, at the *hearing* of appeal, objected to the portion of the decree of the lower Court. There is no disposal of the memorandum ; so, no costs can be allowed—Ss. 218, 219, 220, Civil Procedure Code. [*C. J.*—Is S. 218, Civil Procedure Code, exhaustive? S. 16, Court Fees Act, simply says that the memorandum will not be heard until it is stamped. It is on court's file]. The filing of the memorandum of objections shows only an *intention* to appeal. Until 1903 costs were not usually given on withdrawal of memorandum of objections. *Subbaraya* v, *Vedanta*[3] shows that the usual mode is to say that the memorandum is not argued. A. S. 31 of 1903 is a case in which costs were allowed ; also S. A. 135 of 1905. Ap. 208 of 1905 is a case in which the appeal was withdrawn, but the appellant was obliged to pay the costs of the memorandum where there was no hearing of the appeal. That is not the present case.

1. (1883) 11 Q. B. D. 674, 691. 2. (1879) I. L. R. 4 C. 583.
3. (1904) I. L. R. 28 M. 23, 25.

T. V. Muthukrishna Aiyar. The memorandum is before the Court even before the stamp is affixed. The memorandum is not a distinct thing from the appeal. The Court takes notice of the memorandum from the time it is filed, though no fee is paid. If service of notice is not filed the Court compels service. Translation of papers in memorandum is allowed—S. A. 135 of 1905. There is only one decree in a case even on memorandum. Recent practice is to allow costs.

The Court delivered the following

JUDGMENT:—*In S. A.* 1431 *of* 1905.—It is not necessary for us to decide whether, in a case where the Court finds under S. 491 of the Code of Civil Procedure that an attachment under S. 483 was applied for on insufficient grounds, the party against whom the order for attachment was made in a suit for compensation must prove that the defendant acted maliciously. In the present case the lower appellate Court finds on the facts that the 1st defendant acted maliciously and without reasonable and probable cause. The lower appellate Court awarded the plaintiff Rs. 256 by way of special damages and a further sum of Rs. 250 for general damages for loss of credit and reputation. Sir *V. Bhashyam Aiyangar* has contended that general damages are not recoverable. He conceded that he had not been able to find any authority in support of this contention. It seems to us that an order under S 483, Civil Procedure Code, where the application has been made on insufficient grounds, must necessarily cause damage to the credit and reputation of the party against whom the order is made, and we think general damages are recoverable. The principle of the decision in *Quartz Hill Gold Mining Company* v. *Eyre*[1] is, in our opinion, applicable to a case of this sort.

The second appeal is dismissed with costs.

On behalf of the 1st respondent a memorandum of objections was filed in this Court and a copy of the memorandum served upon the appellants under S. 561 of the Civil Procedure Code. Mr. *Sundara Aiyar* who appeared for the respondent, did not move his memorandum of objections, and he contended that in these circumstances, the Court had no jurisdiction to make any order

1. (1883) 11. Q. B. D. 674.

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with regard to it. His contention was that there was nothing before the Court with which it could deal judicially. A party may file his memorandum of objections without stamping it as it is not one of the documents to which S. 6 of the Court Fees Act applies. Under S. 16 of the Act, the Court cannot hear the objection until the proper stamp fee has been paid by the respondent. In the present case the memorandum of objections was not stamped, but though not stamped, it is before the Court, and the Court, in our opinion, has jurisdiction to deal with it, and the Court cannot be deprived of this jurisdiction because the respondent refrains from moving it. To hold otherwise might work serious hardship to appellant. On receiving a copy of the memorandum of objections an appellant may incur costs in connection with the memorandum in order that he may be prepared to fight it. Rule 88 of the Appellate Side Rules expressly provides that when a memorandum has been filed the appellant may file an additional list of documents which he desires to have translated and printed. If the Court has no jurisdiction to deal with a memorandum of objections which has not been moved, an appellant may have to pay out of his own pocket costs which he has incurred on account of the memorandum of objections which the respondent, for his own purposes, refrains from moving. The practice as to the form of order, when a memorandum of objections has not been stamped and has not been moved, does not seem to be uniform, but orders dismissing the memorandum, in such circumstances, have been made, and we are of opinion there is jurisdiction to make the order. If there is jurisdiction for making an order dismissing an application, there is, of course, jurisdiction to make an order dismissing it with costs. The memorandum of objections in the present case is dismissed with costs. In S. A. No. 1432 of 1905, the second appeal is dismissed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis and Mr. Justice Munro.

Robert Gordon Orr and others .. Plaintiffs* (*Petitioners*).

v.

Chokalingam Pillai and others .. Defendants (*Respondents*).

Orr v. Chokalingam.

Madras Acts—Rent Recovery Act—Landlord and tenant—Tenant in possession during the fasli—Liability—Subsequent transfer.

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* C. R. P. No. 488 of 1907 22nd April 1908.

The person in possession of the land during the fasli is the one responsible for the rent of the fasli, and a decree can be passed against him if a proper patta had been tendered to him, even though he had parted with the lands on the date of suit. Orr v. Chokalingam.

Petition under S. 25 of Act IX of 1887 to revise the decree of the Subordinate Judge's Court of Madura (East) in S. C. S. No. 1345 of 1906.

The Advocate General (*P. S. Sivaswamy Aiyar*) for petitioners.

K. Balamukunda Aiya and *C. V. Anantakrishna Aiyar* for respondents.

The Court delivered the following

JUDGMENT:—The suit lands were transferred to the 1st defendant. Subsequently the landlord took summary proceedings against the former owner and brought them to sale under S. 38 of the Rent Recovery Act. All that passed under that sale was the interest of the former owner—*Rajagopal* v. *Subbaraya*[1]—but the former owner having previously parted with his interest in the property in favour of the 1st defendant, nothing passed by the said sale, and the title of the 1st defendant was not affected thereby. The 1st defendant has mortgaged the lands, and the mortgagee has now obtained a decree for sale. Under these circumstances, the 1st defendant professes that he has no further interest in the property and denies his liability to pay rent for *faslis* 1314 and 1315. He was the owner for these *faslis*, and is the person liable to pay rent for them, and pattas have been duly tendered to him by the plaintiffs. Under these circumstances, we think that the plaintiffs are entitled to recover against him, and must reverse the decree of the lower Court and give judgment for the plaintiffs with costs throughout against the 1st and 2nd defendants. As regards the 3rd defendant, the petition is not pressed and is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis.

Rasu Mudaliar	..	Plaintiff* (*Petitioner.*)
v.		
Veerasami Pillai and others	..	Defendants (*Respondents*)

Parties—Non-joinder—Suit by one of several trustees impleading co-trustee as defendant. Rasu Mudaliar v. Veerasami Pillay.

* C. R. P. No. 511 of 1907. 16th April, 1908.

1. (1883) I. L. R. 7 M. 31.

Basu Mudalier v. Veerasami Pillay.

A suit by one trustee impleading a co-trustee as defendant is not liable to be dismissed on the ground that plaintiff has failed to prove that the defendant co-trustee refused to join him as co-plaintiff.

[*Parameshwaran* v. *Shangaran* 1 followed.]

Petition under S. 25 of Act IX of 1887 to revise the decree of the Subordinate Judge's Court of Tanjore in S. C. S. No. 1152 of 1906.

V. C. Sheshachariar for petitioner.

K. Ramachandra Aiyer and *C. V. Anantakrishna Aiyar* for respondent.

The Court delivered the following

JUDGMENT:—S. 28 of the Code of Civil Procedure cannot enable the plaintiff to join with his suit against the 1st defendant a suit for an account against his co-trustee, the 2nd defendant, over which the Small Cause Court has no jurisdiction. It is said, however, that the Subordinate Judge should have allowed the plaintiff to proceed with his suit against the 1st defendant. Where one co-trustee joined the other as one of the defendants, and it was not shown that the other trustee had refused to be joined as plaintiff, it was held in *Parameswaren* v. *Shangaran*[2] that the District Judge was right in dismissing the suit on the ground that the co-trustee was not joined as plaintiff. The case of *Savitri Antarjanam* v. *Raman Namboodiri*[3] is to the same effect. On the other hand, the case of *Peria Karuppan* v. *Velayuthan Chetty*[4] appears to approve of the case of *Pyari Mohan Bose* v. *Kedar Nath Roy*[5] in which it was held immaterial whether the co-trustee is made a defendant or a plaintiff. Following this as the latest authority in this Court, I set aside the decree of the Subordinate Judge and remand the case to him for disposal according to law. Costs will abide the event.

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1. (1905) I. L. R. 29 M. 303.
2. (1891) I. L. R. 14 M. 489
3. (1900) I. L. R. 24 M. 296.
4. (1905) I. L. R. 29 M. 303.
5. (1900) I. L. R. 26 C. 409.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Sir Arnold White, *Kt.*, Chief Justice, Mr. Justice Wallis and Mr. Justice Sankaran Nair.

K. V. S. Sheik Mahamad Ravuther .. Appellant*
(*1st Plaintiff.*)

v.

The B. I. S N. Co. and others .. Respondents
(*Defendants.*)

Appeal under S. 15 of the Letters Patent from the judgment and decree of the High Court, in S. A. No. 97 of 1904.

Sheik Mahamad Ravuther v. B. I. S N. Co.

Bill of Lading—Construction—Carrier's negligence—Contract between carrier and consignor—Terms opposed to public policy—Contract Act, Ss. 23, 151.—Letters Patent, Cl. 15—Whether whole case open on appeal—Common Carriers Act—Act III of 1865—Statute, construction—Applicability of principles embodied in Act to cases outside the Act—English Common Law, applicability of, to Indian cases.

Per *Curiam* :—On an appeal from a judgment of two Judges of the High Court who differed in opinion, the appeal is not confined to the point upon which the Judges differed, but the whole case is open on the appeal.

Per *Chief Justice* and *Wallis* J. (*Sankaran Nair* J. *contra*) :—Contracts exempting a carrier from liability for the negligence of his servants are not void in India as opposed to public policy.

The defendant Company undertook to carry some bags of rice belonging to plaintiffs and deliver them at Tuticorin. The goods were landed and stored on the foreshore at Tuticorin from the 24th to 30th of October. On account of heavy rains from the 27th October, the goods were damaged The finding of the District Judge was that the plaintiffs were not guilty of negligence. Both *Subrahmanya Aiyar* and *Miller* JJ. were of opinion that the defendants were guilty of negligence.

Held, per *Chief Justice* and *Sankaran Nair* J., on the facts found, that no precautions having been taken by the defendants to prevent the goods being damaged by rain, the defendants were negligent and were liable for the damage to the goods.

Per *Wallis* J.—The manner of discharging is, in the absence of special terms to be determined by reference to the regulations and practice of the port of discharge : that having regard to the custom of the port and the other circumstances of the case, the defendants were not liable.

The bill of lading contained in addition to an exception clause as regards "accidents, loss or damage from any act, neglect or default whatsoever of the pilot, master or mariners or other servants of the Company" another clause which ran thus : "In all cases and under all circumstances, the liability of the Company shall absolutely cease when the goods are free of the ship's tackles, and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee."

Chief Justice.—A ship owner is not exempted from liability for negligence unless the contract which exempts him is both clear and express, and the contract, evidenced by the bill of lading in the present case, though perhaps clear,

* L. P. A. No. 73 of 1906. 23rd March of 1908.

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was certainly not express so as to protect the defendants from liability for their negligence in landing the goods.

Per *Wallis* J.—The carriers have sufficiently protected themselves from liability for the negligence of their servants during the discharge of the cargo.

Per Sankaran Nair J. :—A ship-owner is a bailee within the terms of S. 151 of the Contract Act.

A common carrier may exempt himself from the liability of an insurer by contract, but cannot exempt himself from the liability of an ordinary carrier imposed by S. 151 of the Contract Act, and a contract in India so exempting him is opposed to public policy.

The obligation imposed by S. 151 of the Contract Act applies to bailees as well as to their servants in the discharge of their duty.

The later developments in the Common Law in England as to the capacity of a common carrier to exempt himself from liability for loss due to his own negligence has not been adopted in India, but has been declared inapplicable by Act III of 1865 to the cases falling within the Act.

Though an Act may be inapplicable it ought to be followed as a rule of justice, equity and good conscience in cases similar to those dealt with by the Legislature, and in the case of ship-owner's liability, the principles embodied in Act III of 1865 ought to be followed.

A rule of English Common Law ought not to be followed when it is opposed to the principles followed and acted upon by the Indian Legislature.

The facts of the case and the contentions of the parties appear in I. L. R. 30 M. 79.

P. R. Sundara Aiyar and *V. C. Seshachariar* for appellant.

C. F. Napier for respondent.

P. R. Sundara Aiyar and *V. C. Seshachariar* for appellant (plaintiff):—The English law previously was that the carrier could not contract out of his common law liability; now the law is otherwise. The American law still is that he cannot—per *Cowan* J. in 32 Am. Dec. 494. [*C. J.* and *Wallis* J.—Almost all the English bills of lading do contain a clause for exemption from liability for negligence.] It is true; the question is whether it is valid under the Indian Law. [*C. J.* and *Wallis* J.—The question is simply as to who is to insure.] Whether there is any insurance or not, the liability as carrier subsists until the whole delivery is made. The clause in the bill of lading that the shipowner's liability ceases when the goods are free of the ship's tackle refers only to his liability as common carrier. But that does not relieve him from liability for any negligence in delivery—BEAVAN on *Negligence* Vol. II, p. 1310. In the present case the defendants covenanted to deliver *on land*. If exemption from negligence is sought for, that must be expressly covenanted for; it cannot be inferred from general

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words. In *British India Steam Navigation Company* v. *Ratansi Ramji*[1] the bill of lading was almost the same with some difference. There, exemption in certain cases alone was provided for. The shipowner there, who was liable also to land the goods, made short delivery. Here, the bill provides for exemption from all difficulties generally. It is only after the decision in *British India Steam Navigation Co.* v. *Ratansi Ramji*[1] that the defendants changed the form of their bill of lading. Whatever change they might have intended to effect, the change has been for the worse. Under the present bill of lading the liability is greater. The exemption clause as it stands will include even exemption from fraud or wanton mischief or negligence—CARVER on *Carriage by Sea*, 4th Edn., p. 128. Whether in consequence of the exemption the liability as common carrier exists or not, they are liable as bailees—BEALE ; p. 470 ; *Robinson* v. *Gt. W. Ry., Co.*[2] ; *Mallet* v. *Gt. E. Railway Co.*[3] ; *Michell* v. *Lancashire & Yorkshire Railway Co.*[4]; and *Cairns* v. *Robbins.*[5] The defendants are liable to stack the goods. It is admitted in the pleadings. The very contract is to *deliver* the goods. Therefore until delivery the goods remain in defendants' possession. We have no right to the goods until delivery. It does not matter whether the shipowners or the plaintiff paid the storage charges so long as the goods are in the possession of the shipowners. The shipowner has to land goods of various persons and has to sort them in the foreshore and store them in the rooms in the port. As regards all charges the bill of lading says we must pay. Defendants cannot escape liability by not charging warehouse rent, when it is their duty to safely deliver the goods to us. The general exemption from all liability is insufficient. Exemption from negligence must be specific—*Price* v. *Union Lighterage Company.*[6] This decision was upheld by the Court of Appeal in (1904) 1 K. B. 412. Words such as "the owners not being liable for any damage or loss with regard to goods which can be covered by insurance" as in *James Nelson & Sons Ld.* v. *Nelson Line, Ld.*[7] ; "were carried at owner's risk" as in *D' Ark* v. *London & N. W. Railway Co.*[8] ; "in no case is the

1. (1896) I. L. R. 22 B. 184.
2. (1866) L. R. 9 C. P. 325. (S. C.) 35 L. J. C. P. 123
3. (1899) 1 Q. B. 309.
4. (1875) L. R. 10 Q. B. 256.
5. (1841) 8 M. & W. 258.
6. (1903) 1 K. B. 750.
7. (1907) 1 K. B. 769.
8. (1874) L. R. 9 C. P. 325.

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ship to be liable for any loss or damage" as in *Pearl Moore* [1]; were held not to exempt the shipowner from his or his servants' negligence. *Sutton & Co.* v. *Cicere & Co.*[2] shows that though insurance risks may be provided against, the liability from the position as bailees cannot be taken away. A general clause does not relieve the defendant from his ordinary liability. In the present case the language is similar to the above. See also CARVER on *Carriage by Sea* at p. 128. *Wyld* v. *Pickford* [3] is not really against me. *Taubman* v. *Pacific Steam Navigation Co.*,[4] though against me, and though cited in argument before the Court of Appeal, has not been noticed in the judgment in *Price & Co.* v. *Union Lighterage Company.*[5] There the words were "not liable for loss or damage under any circumstances whatever." That case is not in accordance with later cases, and is not followed. Moreover, it appears from the case that the defendants were not common carriers. BEAVEN on *Negligence* in Vol. II, pp. 1198 and 1310, refers to this case and says that it will not probably be followed in England, and certainly not in America.

The words " and all perils, dangers and accidents of the sea rivers, land," etc., refer only to a particular stage of the *voyage* and not to *delivery*. The later clauses deal with storage and delivery. *British India Steam Navigation Company* v. *Ratansi Ramji*[6] and *B. I. S. N. Company* v. *Ibrahim Sulaiman*[7], in both of which the bills of lading were the same, show that the Company cannot avail itself of the first clause of general exemption. *Hassanbhoy* v. *B. I. S. N. Company*[8] and *Jellicoe* v. *B. I. S. N. Company*[9] lay down that the exemption would extend to all stages of the voyage; p. 585. *Borthwick* v. *Elderslie Steamship Company*[10] shows that the exemption must specifically refer to the various stages of the voyage—*Rathbone Brothers & Co.* v. *D. MacIver Sons & Co.*[11] The general liability will be untouched by any clause of general exemption—per *Vaughan Williams* L. J. The bill of lading in that case contained general words of exemption regarding liability and also a final clause as in the present case.

1. (1904) P. 286.
2. (1890) 15 A. C. 144.
3. (1841) 8 M. & W. p. 443.
4. (1872) Law Times 704.
5. (1903) 1 K. B. 750.
6. (1896) I. L. R. 22 B. 184.
7. (1895) I. L. R. 19 M. 169.
8. (1889) I. L. R. 13 B. 571.
9. (1884) I. L. R. 10 C. 489.
10. (1904) 1 K. B. 319.
11. (1903) 2 K. B. 378.

That case is exactly on all fours with the present case. *Romer* and *Stirling* L. JJ. express the same opinion. The special clause cuts down the general exemption to one for negligence under particular circumstances. It is impossible to know what the real intention of introducing the exemption was. The question is: What is the intention that can be gathered from the terms of the contract? When there is a particular clause governing a portion of the duties, the general clause cannot be availed of—*B. I. S. N. Company* v. *Ratansi Ramji*[1]. In *Hussanbhoy* v. *B. I. S. N. Company*[2] the language of the so-called general clause applied only to the stage of voyage and not of delivery. This must be so as there was a separate clause at the end dealing with delivery. In *Steel* v. *The State Line Steamship Co.*[3] the exemption referred only to the stage of transit. Similarly, it cannot be availed of after transit—*Tattersal* v. *The National S. S. Company, Limited*[4]; *Maori King* v. *Hughes*[5]; "*The Accomac.*"[6] The decision in "*Carron Park*"[7] turned upon the special words there.

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Again, a shipowner cannot on grounds of public policy have such a contract of exemption from all negligence. Judges even in England have regretted the state of the law there. The conditions of this country require the adoption of the rule I contend for. Allowing ship-owners to get out of their liability for negligence is allowing them to repudiate their liability as public carriers. It is not simply a protection of the Indian consignee. The Judge-made law of England may not be, and need not be, applicable in India. The common law of England which exempts public carriers from acts of God and King's enemies alone, should be applied. Judge-made law in England might have risen out of the necessities of that country. *Peek* v. *Directors of North Staffordshire Railway Co.*[8] held that a special clause in a contract was unjust and unreasonable. This case shows the his tory of the law with regard to the liability of a common carrier. American Decisions, Vol. 32, p. 470, show that the American law takes my view, viz., that gross negligence is equal to fraud; that no one can get himself exempted from liability for gross negligence. A shipowner is a common carrier. See Century Digest,

1. (1896) I. L. R. 22 B. 184.
2. (1889) I. L. R. 13 B. 371.
3. (1878) 3 A. C. p. 72.
4. (1884) 12 Q. B. D. 297.
5. (1895) 2 Q. B. 550.
6. (1880) 15 P. D. 208.
7. (1890) 15 P. D. 203
8. (1863) 10 H. L. 472: s. c.; 11 E. R. 1109.

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Vol. IX., p. 567—per Lord *Ellenborough* in *Leeson* v. *Holt*.[1] 129 U. S. Reports 397, 438 settles the law in America. The course of decisions is given in Vol. V. *Petersdroff*, p. 114; *Pearson & Son Ltd.* v. *Lord Mayor of Dublin*[2] shows that a contract exempting one from fraud is illegal. Indian Act III of 1865 (Common Carriers) and Indian Acts IV of 1879 and IX of 1890 (Railway Acts) lay down that special contracts must be reasonable. S. 23 of the Contract Act lays down that contracts against public policy are illegal and unenforceable. It is no answer to say that breaches of such contracts can be insured. PAYNE on *Bailments*, p. 306, says that Railway Companies cannot take shelter under unreasonable contracts. No inference can be drawn from the silence of the Legislature. It generally waits until there is a course of decisions declaring that such contracts are against public policy.

C. F. Napier for respondent.—42 Chancery Division 321 shows citation of American decisions has been very much deplored by all the Judges of the Court of Appeal. [*Sankaran Nair* J.—Then I would be content with Indian cases alone.] But the point has been decided mostly in England, and the other side has quoted mostly English cases. We have our guide only there. [*S. N.* J.—Wherever we feel difficulty, we have to be governed by the rule of justice, equity and good conscience] The matter first depends upon the construction of the contract. I will assume non-negligence on the part of the defendants. We have not got here the broad rule regarding carriers under the common law. *Glynn Mills Currie & Co.* v. *The East & West India Company*,[3] *Ledduc & Co.* v. *Ward*,[4] shows that the primary object of a bill of lading is to express the terms of the contract between a shipper and a ship-owner. Exemptions are co-extensive with liability. The same is laid down in *Husanbhoy* v. *B. I. S. N. Co.*[5] The general exemption clause there is the same as in the present case. As long as there is no provision which limits the exemption specifically to a particular stage of the voyage the exemption must extend throughout, *i.e.*, until the time when the liability is to end. *Jellicoe* v. *B. I. S. N. Co.*[6] where the clause is the same, held that the contract, however unreasonable,

1. (1816) 1 Starkie p. 186.
2. (1907) A. C. 351.
3. (1882) 7 A. C. 591, 596.
4. (1882) 20 Q. B. D. 275, 479.
5. (1889) I. L. R. 13 B. 571, 588
6. (1884) I. L. R. 10 C. 489, 494

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must be enforced. The general exemption clause is here in the very beginning of the contract. The words beginning from "and the Company is to be at liberty, etc." are nothing but "transhipment and deviation" clause. The bill of lading and the conditions form one contract. They are not separate from each other. I will deal more with this later on. I will go on with the cases cited. *The Hongkong & Shanghai Banking Corporation* v. *T. Baker*[1] shows how long the exemption continues, and that it extends even after the goods are landed. The exemption is from fire. Unless there are specific words which limit any exemption to any particular stage of the voyage, it will extend to all acts from beginning to end—SCRUTTON on *Bills of Lading and Charter Parties*, (1904) Edn. p. 204. In *Baerselman* v. *Bailley*[2] the exemption was from negligence "in navigating or otherwise." It was held that negligence in stowing was covered by the general words "or otherwise." "Or otherwise" are not *ejusdem generis* with navigation. They have been held to mean "other than navigation." This case also shows that if two parties choose to enter into a contract under a certain bill of lading the bill binds them both. In *Norman* v. *Binnington*[3] the exemption was exactly similar to the above with the addition of the words "however caused." The decision was similar to the above.

In *In Re Carron Park*[4] "neglect of pilot, etc., whatsoever in navigation during the said voyage" was held to excuse neglect in loading or discharging. I distinguish *Brown* v. *Manchester & Lancashire Railway Company*[5] (this is a Railway case); *Carr* v. *Lancashire & Yorkshire Railway Company*[6] "the owners undertaking all risk of conveyance" as having been decided on the peculiar facts of those cases.

In *Price & Co.* v. *Union Lighterage Company*[7] there was no written contract, but there was only a statement in the stationery used by the Company. In *M. Cawley* v. *The Furness*[8] there was a clause—"provided all reasonable means have been taken to see whether the ship is seaworthy"—at the end of the clause for exemption from unseaworthiness. That proviso made the ship-owner liable.

1. (1870) 7 Bom H. C. R. 186.
2. (1895) 2 Q. B. D. 301.
3. (1890) 25 Q. B. D 475.
4. (1880) 5 P. 203.
5. (1882) 10 Q. B. D. 261.
6. (1852) 21 L. J. Ex. 261.
7. (1903) 1 K. B. 750.
8. (1907) I. K. B. 767.

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In *Pearl Moore*[1] the words "*in no case* is the steamship owner to be liable for heating, or for any other damage" occur. *Walton* J's judgment also is quoted in the argument and judgment. The words 'or for any other damage' are *ejusdem generis* with 'heating.' In *Pearl Moore*[1] the negligence was held to be restricted to negligence from causes similar to heating. In the present case, the words are very wide. In *Price & Co.* v. *Union Lighterage Company*[2] the rule laid down that negligence must be specifically exempted does not prohibit words other than the word 'negligence' being used to denote that idea. Any language that will express the idea of exemption from liability for negligence will be sufficient. That is very clear from *Walton* J's judgment. You must insert in one form or another, something equivalent to ' negligence clause." Lord *Alverston* also in the Court of Appeal laid down only so much. Nor do the other members of the Court of Appeal say any thing more. I will deal with the whole contract here. SCRUTTON also understands *Walton* J's judgment in the same way. SCRUTTON, p. 182, quotes 26 *Law Times Reports* for the proposition it lays down. It has not been overruled. The bill of lading provides that " in all cases and under all circumstances " the Company shall not be liable ; if the shipowner chooses the first method and delivers goods to delivery ship, then he is free from any liability, and then no liability to land the goods will attach to him as bailee. That shows no liabilities as bailee were intended to attach.

The whole bill of lading means that the shipowner is not to be responsible in loading, voyage and delivery. " Free of ship's tackle " means that even when we have not delivered we are not liable. The exception covers certain possible cases. The general clause provides that even in cases not covered by exceptions there is to be no liability. The words " the liability " mean any liability on account of any cause whatsoever. [*C. J.* The principle of the English cases seems to be that where you have both, the general provision is limited by the terms of the special one.] The general exemption itself deals with *delivery*. The clause " In all cases and under all circumstances the liability of the Company is to cease when the goods are free of the ship's tackle" seems to refer to the stage when the goods are delivered. When it is clear that the intention of the shipowner is to free himself from all liability and

1. (1904) P. 286, 296. 2. (1903) I. K. B. 750

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he has so expressed himself clearly in one place in the bill, to say that that is negatived by another clause which does not specifically cut it down is to put on an artificial and unwarranted construction. If the first clause is *ambiguous*, the second may cut it down, or otherwise not.

In *Hajee Ismail Sait* v. *Messageries Maritimes*[1] it was not even argued that contracts with such negligence clauses were opposed to public policy. [*C. J.*—The words in *Hajee Ismail Sait* v. *Messageries Maritimes*[1] are "we are not liable for negligence."] [*Sankaran Nair* J.—You see that English Courts want to aid such special contracts, but at the same time they resort to artificial construction of those contracts. What does it show?] The question is not one relating purely to the Madras Presidency. These contracts affect the whole of India. ABBOT'S *Merchant Shipping*, 14th Edn., 580, 581 and 584, shows that whether a shipowner is or is not a common carrier, he is subject to the liabilities of a common carrier—*Jellicoe* v. *B.I.S.N. Company.*[2] Such contracts have been recognised in England. If it is against public policy at all, it is a question for the Legislature. After all this negligence clause does not in any way prejudice the shipper. He can always insure his goods against negligence.

The onus of proving negligence is on the consignee—SCRUTTON, p. 205. In *Glendall* [3] the Court of Appeal held that as the loss fell within the exceptions, negligence had to be proved by the shipper. The finding of the District Judge is that I took all reasonable care with regard to the goods. This finding is misread by Mr. Justice *Subrahmanya Aiyar.*

P. R. Sundara Aiyar in reply.—The last portion of the bill of lading treats of delivery. The clause of exemption in case of freedom from ship's tackle only applies when the shipowner does not choose the alternative of 'delivery' but gives the goods into a receiving ship. The 2nd clause modifies the 1st either by increasing the shipowner's privileges or by cutting them down as insurers. Therefore the shipowner cannot avail himself of the first clause even if both clauses relate to the same matter. As already said, my construction is that the 1st clause relates only to voyage. After *Price & Co.* v. *Union Lighterage Company*[4] it is impossible

1. (1905) I. L. R. 28 M. 400.
2. (1884) I. L. R. 10 C. 489.
3. (1874) L. R. 9 Exch. 338.
4. (1903) I. K. B. 750.

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to say that exemption from liability for negligence need not be express; vide p. 752; (1904) p. 295 *James Nelson & Sons* v. *Nelson Line, Ltd.*[1] *McCawley* v. *Furness Railway Company*[2] is a case in which a Railway Company was held exempted owing to the existence of the negligence clause from the liability. A difference is made between the case of a passenger and that of his goods. The passenger there was carried "at his risk." With reference to goods the rule has always been that general words were insufficient to give exemption—*The Pearlmoor.*[3] *Rathbone Brothers Company* v. *D. Mac Iver & Sons Company*[4] was not commented on by the other side. That says that the former general clause is no answer. *Carr* v. *Lancashire & Yorkshire Railway Company*[5] is a case of a Railway Company which can, under the Railway Acts, exempt themselves from liability. *In re Carron Park*[6] simply deals with the meaning of "voyage." In another case the words were "navigation or otherwise." "Otherwise" must certainly there mean something besides navigation. If any person who is a common carrier says in his contract that he will not be liable for any acts of his as public carrier his contract must certainly be against public policy. *Laveroni* v. *Drury*[7] shows that a shipowner is a common carrier. As to the point reserved, the construction of S. 15 of the Letters Patent in *Kunhunni* v. *Srivallabhan*[8] seems to be against me. The wording in the original Letters Patent of Madras in S. 15 is 'wherever the Judges are divided in opinion' and not 'whenever' as is printed. S. 15 of the Letters Patent should be construed in the light of S. 36. Whether under S. 15 of the Letters Patent or in case of difference under S. 575, Civil Procedure Code, the appeal is preferred under S. 15, the '*judgment*' is the opinion of a single Judge. S. 39 of the Letters Patent speaks of 'judgments' and 'final judgments.' Appeal under S. 15 is wider, while appeals to the Privy Council are only from final judgments. In *Kunhunni* v. *Srivallabhan*[8] there seems to be no point on which the two Judges were agreed. Moreover, S. 36 was not referred to there. "Wherever" in S. 15 means "on whatever point" and not in "in any case in which." [*Wallis* J.—See at the end of S. 15 the word 'judgment' occurs, from which

1. (1907) 1. K. B. 767.
2. (1872) L. R. 8 Q. B. 57-60.
3. (1904) P. 295.
4. (1903) 2 K. B. 378.
5. (1852) 2 L. T. Ex. 261.
6. (1890) 15 P. 203.
7. 8 Ex. R. 166.
8. (1900) 11 M. L. J. 10, 17.

judgment there is only an appeal to the Privy Council. Then two meanings will have to be given to the same word in one and the same section.] That 'judgment' is further restricted by S. 36. *Roy Nandipat Mahata* v. *Urquhart* [1] says that out of two points only the one on which there was a difference was open to the appellate court under S. 15—*Shahzadi Hajra Begum* v. *Khaja Hussan* [2]. *Brij Bhukan* v. *Durga Dutt*[3] is similar, though the point was never argued before the two Judges originally. *Ram Dal* v. *Ram Das* [4] is the other way.

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C. F. Napier for the respondent was not heard in reply on this point.

P. R. Sundara Aiyar then argued as to on whom was the negligence in fact. *As to onus of proof.* See CARVER, p. 97; CLERK & LINDSELL on *Torts*, p. 468, latest edition ; *E. I. Ry. Company* v. *Kally Doss Mukerji*[5] ; BEAVEN on *Negligence*: Vol. I, 132. The burden was on the Company to show that there was no negligence.

The Court delivered the following

JUDGMENTS :— *The Chief Justice* :—This is an appeal under Article 15 of the Letters Patent, the learned Judges before whom the case came on second appeal having differed in opinion. The plaintiffs claim damages for the loss of 246 bags of rice out of a consignment of 4,000 bags carried by the defendants under a bill of lading from Rangoon to Tuticorin. These 246 bags with others were destroyed by the Municipal authorities after they had been landed, on account of their damaged condition. The plaintiffs alleged the damage was occasioned by the negligence of the defendants or their agents.

The two main questions for consideration are: (1) On the facts were the defendants negligent ? (2) If they were, are they protected by the terms of the bill of lading ? The Court of first instance and the lower appellate Court held that there had been no negligence on the part of the defendants. The two learned Judges of this Court who heard the case on second appeal were both of opinion that the defendants had been negligent, but they differed on the

1. (1870) 4 B. L. R. 181, 191 to 198.
2. (1869) 4 B. L. R. 86 A.C.
3. (1898) I. L. R. 20 A. 258.
4. (1876) I. L. R. 1 A. 181.
5. (1899) I. L. R. 26 C. 465.

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question whether they were protected by the terms of their bill of lading against liability for negligence.

The damage to the goods was caused by rain. The bags were landed in boats, and the District Judge finds there was no evidence that the cargo was put out of the ship during the rain, but that it began to rain while the boats were between the ship and the shore. The District Judge finds, and we must accept the finding as binding on us, as a finding of fact, that the wetting received by the bags of rice between the ship and the shore would have caused no damage if the consignees had taken delivery at once. He also finds that "the damage (by rain) was caused on the foreshore, and the fact that the bags had to stay there a long time was entirely due to the negligence of the consignees, for defendants did all they could to clear the cargo quickly." I think we are bound by the finding that the defendants did all they could to clear the cargo quickly, and I deal with this question of negligence on the footing that the delay in the clearance of the goods after they had been placed on the foreshore was due to circumstances beyond the control of the defendants. The finding of the District Judge that the fact that the goods had to stay a long time on the foreshore was entirely due to the negligence of the consignees, is a finding that the delay was caused by the negligence of consignees generally, and it seems clear from the earliest finding of the Judge, "it is impossible to say the plaintiffs were negligent," that this was not intended by the District Judge to be a finding of negligence on the part of the plaintiffs. In the second place the Judge appears to arrive at this finding as a necessary inference from the fact that the defendants did all they could to clear the cargo quickly. This seems to me to be a *non sequitur*. It does not follow that because the defendants did all they could to clear the cargo quickly, the delay in clearance was caused by the negligence of the consignees generally. Still less does it follow it was caused by the negligence of the plaintiffs. Both carriers and consignees may have done all they could in the circumstances to clear the cargo quickly. It is not suggested that the placing of the goods on the foreshore constituted delivery to the plaintiffs or that apart from the special terms of the bill of lading the defendants' liability came to an end when they deposited the goods on the foreshore. The question, therefore, is, having regard to the local conditions in connection with the landing of goods at Tuticorin and

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the custody of goods by carriers during the interval between the placing of the goods on the foreshore, and the delivery to the consignees, and the season of the year (it is not denied that at this time of the year the "monsoon" may set in any day), the defendants were guilty of negligence in not taking precautions to protect the goods from being damaged by rain notwithstanding the fact (as found) that they did all they could to clear them quickly.

Now the facts found or admitted are these :—The practice at the port of Tuticorin in connection with the landing of cargo from steamships is to land the cargo by boats on to the pier, unsorted, and to remove it from the pier to the foreshore and sort it there according to marks. I do not think it was suggested on behalf of the defendants according to the practice which prevails at Tuticorin, the carriers are prepared to give delivery until the cargo landed on the pier has been sorted on the foreshore. When sorted, the goods are at the disposal of the several consignees, and if in the present case the defendants had been able to show that the plaintiff's goods which became damaged by the rain were ready for delivery before they became damaged and the plaintiffs were so informed, the defendants would, in my opinion, be under no liability in respect of the damaged goods. I think since, *ex concesso*, the contract was not terminated by the deposit of the goods on the foreshore, it was for the defendants to show the plaintiff's goods were ready for delivery at the time they were damaged and not for plaintiff to show they were not ready. In my opinion, the case of *The Glendarroch* [1] on which Mr. *Napier* relied with reference to the question of the burden of proof is not in point. According to the evidence of Mr. *Mansfield*, the representative of the local agents of the defendants, the circular, Exhibit I, was sent to the consignees, and it is not disputed that the plaintiff amongst the other consignees received the circular in question. The circular is in these terms —(Exhibit I).—"The consignees of cargo per S. S. *Thorndale* from Rangoon are hereby requested to take delivery of their cargo as it is landed each day and remove at once, as the space for landing on foreshore is very limited. Failing to take delivery at once, the cargo will be on the beach at consignees' entire risk and expense." In my opinion this notice does not

1. (1894) P. 216.

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relieve the defendants from liability in the absence of evidence that the defendants were in fact prepared to deliver the plaintiff's goods. Mr. Mansfield's evidence with reference to this was as follows :—" On the 25th bags were stacked according to marks and ready for delivery. There are no accounts showing how many bags of each mark were sorted and stacked on a particular day. Besides the 1st plaintiff's 4,000 bags there was other cargo consigned to the plaintiffs 2 and 3. I cannot say for certain whether any of the 4,000 bags were ready for delivery on the 24th or the 25th October. Our delivery book shows that 13 bags of S. K. V. S. were delivered on the 27th October. This was the first delivery in the case of the 4,000 bags. I cannot say if any more bags were ready for delivery on that day. I cannot say if any S. K. V. S. mark bags were ready for delivery before the 28th. The consignees cannot remove the bags before they take a delivery order from us which order is given when the cargo is ready for delivery. The delivery order could be given even before the steamer arrives. The consignees have only to show the bill of lading and apply for the delivery order. * * * It rained very heavily on the night of the 27th October and intermittently for some days afterwards. It rained on the day. I cannot say if it rained on the nights. The steamer will not discharge cargo when it rains. If rain sets in when boats are coming with cargo the boats continue the journey. This is what happened in the case of the landing of the bags in question. We did not provide any covering for protecting the bags from rain either on the boats or on the beach. When the heavy rain came we lent to the consignees the few tarpaulins which we had". Mr. Laporte, the former Manager of the local agents, said: "I can't say whether the cargo of a particular consignee was ready for delivery on a particular day; on a reference to the books of our office, some cargo consigned to the plaintiffs 2 and 3 was ready for delivery between the 24th and 28th and was not taken delivery of, but I cannot give the marks of the cargo. I cannot say when the bags bearing the marks S. K. V. S. and J. K. V. S. were ready for delivery". It is not suggested on behalf of the defendants that they took any precautions to protect the goods from the rain. The reason why they did not do so seems clear from Mr. Mansfield's evidence. He stated : "The nature of our liability in the matter of the cargo shipped by steamer will appear from the bill of lading. Our

liability ceases as soon as the cargo has left the steamer's slings. We are not liable for any damage that may happen to the cargo after it leaves the steamer—whether in the boat or the pier or the beach. We are not bound to cover the cargo with tarpaulin. We never covered cargo with tarpaulin, but have lent tarpaulins to our consignees when asked. We have not a large stock of tarpaulins. We have a few tarpaulins and these we keep to cover our own cargo". The figures in Exhibit IV, which the learned Judge accepts, no doubt show that on October 26th, 27th, and 28th, 1900, a very large number of bags had been landed and were ready for delivery, but the figures do not show, and Mr. Mansfield, as I read his evidence, admitted that it could not be shown, that the plaintiffs' bags were ready for delivery at the time they were damaged by the rain. As it is not disputed that the goods were damaged by rain after they had been deposited on the fore-shore and that no precautions were taken by the defendants to prevent their being damaged by rain, and as in my opinion on the facts found and admitted, the defendants' liability in respect of the goods had not come to an end at the time the goods were damaged, I am of opinion that on the facts the defendants were negligent and are liable for the damage to the goods.

Assuming this to be so, the next question for consideration is, are the defendants protected by the terms of the Bill of Lading? The general condition in the bill of lading is as follows:—" The said goods to be carried and delivered subject to the terms and conditions hereof, including those at the foot of the bill of lading, in the like good order and condition, at the port of Tuticorin, the Act of God, the Queen's Enemies, Restraint of Princes Rulers or peoples, restrictions of Quarantine, Prohibition, Pirates or Robbers by Sea or Land, accidents, loss and damage from Vermin, Barratry, Jettison, Collision, Fire, Accidents to or defects latent or otherwise in Hull, Tackle, Boilers, or Machinery, or their apurtenances, Steam, and all the perils, dangers, and accidents of the Sea, Rivers, Land Carriage, and Steam Navigation of whatsoever nature and kind; and accidents, loss or damage from any act, neglect, or default whatsoever of the Pilot, Master or Mariners, or other servants of the Company excepted, and the Company is to be at liberty to carry the said Goods to their Port of Destination by the above or other Steamer or Steamers, Ship or Ships, either belonging to the Company or to other persons, and to

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tranship or land and store the goods either on Shore or afloat, and reship and forward the same at the Company's expense but at Shippers' or Consignee's risk, and with liberty also, at the like risk, to deviate as abovementioned, unto K. V. S. Mohamed Ebrahim Saheb or to his or their assigns." Amongst the conditions at the foot of the bill of lading referred to above is the following:—"The Company is to have the option of delivering these goods, or any part thereof, into receiving Ship, or landing them at the risk and expense of the shipper or consignee, as per scale of charges to be seen at the Agents' offices, and is also to be at liberty until delivery to store the goods or any part thereof, in receiving Ship, godown or upon any wharf, the usual charges therefor being payable by the Shipper or Consignee. The Company shall have a lien on all or any part of the goods against expenses incurred on the whole or any part of the shipment. In all cases and under all circumstances the liability of the Company shall absolutely cease when the goods are free of the Ship's tackle, and thereupon the goods shall be at the risk for all purposes and in every respect of Shipper or Consignee. Fire Insurance will be covered by the Company's Agents on application."

It was contended on behalf of the appellant that the general provision in the bill of lading as to terms and conditions which purported to exempt the defendants from liability for "any act, neglect, or default whatsover of the Pilot, Master or Mariners, or other servants of the Company" referred only to the neglect, or default of defendants' servants engaged in or connected with the navigation of the ship. I should not be disposed to accept this construction of the words—See *Baerselman* v. *Bailey.*[1] But, however this may be, it seems to me that as a matter of construction of the bill of lading, the question of the defendants' liability is governed by the terms of the special condition at the foot of the bill of lading which refers to that stage of the adventure when the goods were free of the ship's tackle. It was not contended by Mr. *Napier* and, having regard to the wording of the special condition, it could not be contended, that the putting the goods on board a receiving ship, or landing them, or storing them, constituted delivery. The special condition clearly contemplates that the delivery is to take place, after doing these acts.

1. (1895) 2 Q B. 301.

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Now it seems to me the defendants cannot be heard to say that for the purpose of protecting themselves against negligence after the goods are free of the ship's tackle they are entitled to pray in aid the general conditions in the body of the bill, and give the go-by to the special condition which in terms relates to the stage of the adventure when the negligence occurred. The special conditions were inserted in the bill of lading by the defendants for their own purposes and their own protection. They contain the terms on which the defendants were prepared to carry the goods with reference to this particular stage of the adventure and it seems to me the question of the liability of the defendants during this particular stage of the adventure must be governed by the special conditions with reference thereto. In fact, I do not think the contrary view was seriously pressed by Mr. *Napier*, and in *British India Steam Navigation Company* v. *Ratansi*[1] in which, I think, it may be assumed the general conditions in the bill of lading were the same though the report does not say so—the point does not seem to have been put forward.

The view which I take appears to be in accordance with the decision of the Court of Appeal in *Rathbone Brothers & Co.* v. *D. MacIver, Sons & Co.*,[2] where the Court holding that the carriers were unable, on the facts, to claim the benefit of a special proviso relating to unseaworthiness, the carriers were held liable notwithstanding general words in the bill of lading which exempted them in the case of injury or default.

In the Bombay case to which I have referred, the suit was against the same defendants, and it would seem that the defendants have amended this bill of lading to meet the decision in that case. The first clause of the special condition in the bill of lading in the Bombay case is the same as in the present case, but in the bill of lading in the present case new provisions have been inserted in substitution for a provision which purported to impose on the consignee, where the goods were stored, "all risks of fire, dacoity, vermin *or otherwise*." It was held by the Bombay High Court that the words "*or otherwise* " could not be held to cover all possible losses. The words " in all cases and under all circumstances" in the present bill of lading are, no doubt, as wide and as general as possible, but the reiterated use of general words does

1. (1896) I. L. R. 22 B. 184. 2. (1903) 2 K. B. 378.

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not, of course, exclude the application of the special canons of construction which a long course of judicial decisions has held applicable to the construction of contracts which purport to relieve a carrier from liability for negligence. The authorities were discussed by *Walton* J. in *Price & Co.* v. *Union Lighterage Company.*[1] In that case goods were loaded on a barge under a contract for carriage by which the barge owner was exempt from liability "for any loss of or damage to goods which can be covered by insurance." The barge was sunk owing to the negligence of the servants of the barge owner, and the goods were lost. The learned Judge held that the barge owner was not protected from liability by the contract. In the course of his judgment the learned Judge observed "......If it were right or permissible to deal with this case without regard to the rules of construction which have been laid down in a well-known series of cases and looking only at the language used, it might very well be said that its meaning was that the defendants were to be exempt from liability for insurable losses whether caused by negligence or not. But there is, I think, a well-established rule of construction applicable to the present case. The law of England, unlike in this respect the law of the United States of America, does not forbid the carrier to exempt himself by contract from liability for the negligence of himself and his servants; but, if the carrier desires so to exempt himself, it requires that he shall do so in express, plain, and unambiguous terms." After discussing the authorities *Walton* J. summarises their effect in these words—"It really comes to this, that if a carrier wishes to exempt himself from liability for the negligence of his servants he must insert in his contract, in one form or another, something equivalent to what is well known as a negligence clause." Now I understand a negligence clause to be a provision which, in express terms, exempts a carrier from liability for the negligence of his servants. The specific condition in the bill of lading in the present case contains no such provision. The judgment of *Walton* J. was affirmed by the Court of Appeal in (1904) I. K.B. 412, *Collins* M.R observing in his judgment that the judgment of *Walton* J. puts the decision of the case upon the right principle, and stated precisely the result of the authorities.

1. (1903) I. K. B. 750.

In *James Nelson & Sons, Limited* v. *Nelson Line (Liverpool) Limited*[1], *Collins* M. R. again refers to the judgment of *Walton* J. as containing "a complete and accurate exposition of the law." In *The Pearlmoor*,[2] *Gorell Barnes* J. cites a passage from the judgment of *Walton* J. as summarising his own view. The passage in question is with reference to the rule laid down by Lord *Bowen* in *Steinmain & Co.* v. *Angier Line*[3], and is as follows:— "I understand the meaning of this to be that an exemption in general words, not expressly relating to negligence, even though the words are wide enough to include loss by the negligence or default of the carrier's servants, must be construed as limiting the liability of the carrier as assurer, and not as relieving him from the duty of exercising reasonable skill and care. If the carrier desires to relieve himself from the duty of using by himself and his servants reasonable skill and care in the carriage of goods, he must do so in plain language and explicitly, and not by general words"—(1903) I. K. B. 750, at p. 754. In *James Nelson & Sons, Limited* v. *Nelson Line (Liverpool) Limited*[1], the Court of Appeal applied the principle of *Walton* J's decision in a case in which the clause in the bill of lading ran "the carrier not being liable for any damage or detriment to the goods which is capable of being covered by insurance or which has been wholly or in part paid for by insurance and the plaintiffs were partially covered by insurance and had been paid the insured proportion of the loss. This case was taken to the House of Lords—(1908) A. C. 16—and the decision of the Court of Appeal was affirmed on the ground that as there was no clear and express exemption, the ship-owner was not relieved from his duty to take reasonable care. The Lord Chancellor said that if he had been obliged to affix a definite meaning to the disputed language, he would prefer the plaintiffs' construction (*i. e.*, a construction which would not exempt the defendants from liability; but he based the judgment, in which the other learned Lords concurred, on the ground that the clause taken as a whole was "so ill thought out and expressed that it was not possible to feel sure what the parties intend to stipulate, and the Lord Chancellor stated that he rested his opinion on the ground that the document was ambiguous. Then follows a passage

1. (1907) 1 K. B. 769.
2. (1904) P. 286.
3. (1891) 1 Q. B. 619.

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in the Lord Chancellor's judgment which has to be carefully considered with reference to the judgments of the Court of Appeal in the cases to which I have referred. The passage runs thus:—"I wish to say, with the utmost respect for the arguments of counsel, I cannot agree in what I think was the contention, that there is a canon of construction by which the rigour of interpretation in some commercial documents must be proportioned to the importance of the stipulation to be construed. I know of only one standard of construction, except where the words have acquired a special conventional meaning, namely, what do the words mean on a fair reading, having regard to the whole document?"—(1908) A. C. 16 at p. 20. Now what the Lord Chancellor stated as the argument of counsel with which he could not agree was "the contention that there is a canon of construction by which the rigour of interpretation in some commercial documents must be proportioned to the importance of the stipulation to be construed." The principle which underlay *Walton* J's judgment and which was accepted by the learned Lord Justices and by *Gorell Barnes* J. was much more precise and specific than the contention of counsel before the House of Lords and described by the Lord Chancellor. The principle was that an exception in general words, not expressly relating to negligence even though the words are wide enough to include loss by the negligence or default of the carrier's servants, must be construed as limiting the liability of the carrier as assurer and not as relieving him from the duty of exercising reasonable skill and care, and that if the carrier wishes to exempt himself from liability for the negligence of his servant he must insert in his contract something equivalent to a negligence clause. I cannot help thinking that if the Lord Chancellor had intended to repudiate this principle of construction as applicable to documents when a carrier purports to relieve himself from liability for negligence, he would have done so in express terms. It is no doubt true that the bill of lading in the present case does not contain contradictory terms, and in a sense it is not ambiguous, but the portion of the bill of lading which deals with the liability of the carrier at the particular stage of the adventure when the negligence occurred, is not express with reference to the question of negligence, and this being so I do not think the carrier is protected.

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Having regard to the way in which the earlier authorities have been considered in the more recent cases, I do not propose to discuss the earlier cases which were cited in argument. I will merely say that as regards shipping contracts with the exception of *Taubman* v. *The Pacific Steam Navigation Company*,[1] I know of no case in which the shipowner has been held to be protected from negligence unless the contract protected him from negligence in express terms. It seems doubtful whether this case should now be treated as a binding authority. Further, the contract there had reference to passengers' baggage, and it is not clear whether the shipowners were under any liability as common carriers with regard to this baggage.

As in my view of the law a shipowner is not exempted from liability for negligence unless the contract which exempts him is both clear and express, and as the contract in the present case, though it may perhaps be said to be clear, is certainly not express, I am of opinion that the defendants are not protected by their bill of lading.

Two other questions remain for consideration. I can deal with them shortly. Mr. *Sundara Iyer* contended that a contract which purported to relieve a shipowner from his liability as a carrier for negligence was contrary to public policy and should not be enforced. As pointed out by *Walton* J. in *Price & Co.* v. *Union Lighterage Company*[2] the law of the United States of America forbids a carrier to exempt himself by contract from liability for negligence, whilst the law of England does not. I am of opinion that on a question of this character Courts in India ought to follow the law of England.

Mr. *Sundara Aiyar* raised the point that as the learned Judges who heard this case on second appeal did not differ on the question of negligence no appeal lay under Article 15 of the Letters Patent with reference to this question. This point is covered by authority. In *Kunhunni* v. *Vallabhan*[3] it was held by a Full Bench of this Court that the limited construction contended for by Mr. *Sundara Aiyar* should not be put on Article 15 of the Letters Patent.

I am of opinion that this appeal should be allowed with costs throughout and that if the parties cannot agree as to

1. (1872) 26 L. T. 704. 2. (1903) 1 K. B. 750.
3. (1900) 11 M. L. J. 10 at p. 17.

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damages the case should go back to the Court of first instance in order that damages may be assessed.

Wallis J:—In this case the learned Judges before whom the case came on second appeal differed on the question whether the defendants were liable under the terms of their bill of lading for loss or damage occasioned to the goods whilst in course of landing and delivery by reason of the negligence of their servants. In the result the decree of the lower appellate Court was affirmed under S. 575, Civil Procedure Code, and the plaintiff has now preferred this appeal under S. 15 of the Letters Patent. The lower appellate Court held that under the bill of lading the defendants were not liable for the negligence of their servants and also found as a fact that there had not been any negligence, but both the learned Judges before whom the case came on second appeal though differing as to the liability of the defendants for negligence were of opinion that this finding must be set aside, and that the defendants were guilty of negligence. The question most argued before us was whether the defendants were liable under their bill of lading for negligence in landing the cargo, but it was also contended by the appellant that even if the bill of lading on its true construction exempted the defendants from liability for the negligence of their servants, such an exemption was opposed to public policy and void under S. 23 of the Indian Contract Act.

Further questions were raised as to whether in an appeal to this Court under S. 15 of the Letters Patent it was open to either party to re-open any question on which the learned Judges had agreed, and, if so, whether in the present case the learned Judges were right in setting aside the finding of the lower appellate Court that there had been no negligence.

As regards the third point, I am of opinion that on an appeal from a judgment of two Judges of this Court who have differed in opinion, the appeal is not confined to the point upon which the learned Judges differed and that the whole case is open on the appeal. Clause 15 provides (1) that from the judgment of a single Judge of the High Court an appeal shall lie to the High Court; (2) that from judgments of two or more Judges of the High Court, where they are equally divided and do not constitute a majority of the Court, an appeal shall also lie to the High

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Court; and (3) that appeals from other judgments of the High Court shall lie to the Privy Council. There is nothing in the clause to suggest that appeals under (2) are more restricted than appeals under (1) and (3). Nor is there anything in the conclud-ing portion of Cl. 36 which merely provides how a case is to be decided when the Judges before whom it is heard are equally divided in opinion, or in Cl. 39 which places certain restrictions on the right of appeal to the Privy Council provided for in the third part of Cl. 15. This is how, in my opinion, the case stands upon the language of the sections, and the same conclusion has been arrived at in the judgment of a Full Bench in *Kunhunni* v. *Srivallabhan*[1] by which we are bound.

As regards the 2nd point, I am of opinion that it is not open to us to hold that contracts exempting a carrier from liability for the negligence of his servants are void as opposed to public policy. As pointed out by *Walton* J. in *Price & Co.* v. *Union Lighterage Company*[2] "the law of England, unlike the law of the United States of America, does not forbid the carrier to exempt himself by contract from liability for the negligence of himself and his servants; but, if the carrier desires so to exempt himself it requires that he shall do so in express, plain, and unambiguous terms." So far as the general question goes this is the law which has been received and applied by the Indian Courts—*Jellicoe* v. *The British India Steam Navigation Co.* [3]; and *Hajee Ismail Sait* v. *The Company of the Messageries Maritimes of France.*[4] Contracts have been made and business has been carried on for many years in India on this footing, and if the law is to be altered now it must be by the Legislature.

The next point is, assuming the rule laid down by *Walton* J. to be correctly stated—and several subsequent cases were cited in which it was approved—whether in the bill of lading the carriers have stipulated for exemption from liability in terms sufficiently express, plain and unambiguous to satisfy the artificial rule of construction enunciated by *Walton* J. After stating the effect of the earlier cases *Walton* J. sums up by saying: "It really comes to this, that if a carrier wishes to exempt himself from liability for the negligence of his servants he must insert in

1. (1900) 11 M. L. J. 10.
2. (1903) I. K. B. 750.
3. (1884) I. L. R. 10 C. 489.
4. (1905) I. L. R. 28 M. 400.

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his contract, in one form or another, something equivalent to what is well-known as a negligence clause." In that case, the only evidence of the terms of the contract was a statement at the head of the carriers' stationery that they would not be liable for any loss or damage which could be covered by insurance, and *Walton* J. held that these general words would not exempt them from liability for their servants' negligence. In the present case the bill of lading expressly excepts "accidents, loss or damage from any act, neglect, or default whatsoever of the Pilot, Master or Mariners, or other servants of the Company,' and, to borrow the language of Mr. *Scrutton* in Art. 91 of his book on 'Charter-parties and Bills of Lading,' exceptions such as this "unless otherwise clearly worded, limit the shipowner's liability during the whole time he is in possession of the goods as carrier, and therefore apply during the loading and discharging of the goods."

The respondents, however, rely on one of the conditions at the foot of the bill in which it is stipulated that the Company is "to have the option of delivering the goods, into a receiving ship, or landing them at the risk and expense of the shipper or consignee, and is also to be at liberty untill delivery to store them in receiving ship, godown or upon any wharf, the usual charges therefor being payable by the shipper or consignee," and that "in all cases and under all circumstances the liability of the Company shall absolutely cease when the goods are free of the ship's tackle, and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee." The question is, do these general words impose upon the carriers a liability for the negligence of their servants from which they would have been exempted under the express terms of the bill but for these words. In my opinion, reading the exception with the condition, the clear intention of the parties was by these words to confer upon the carrier as regards this particular stage of the adventure a larger degree of exemption than he had stipulated for generally as regards the whole adventure in the exceptions. To read such general words of exemption as imposing upon the shipowner as regards this stage a liability for negligence against which he has already stipulated generally is, in my opinion, not so much interpreting as altering the contract. The rule laid down in the judgment of *Walton* J. is a rule of interpretation

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and there was no difficulty in applying it in that case as the general words stood alone and there was no context to throw any light on the intention of the parties. In *Steinman & Co.* v. *Angier Line*[1], one of the principal cases cited, *Bowen* L. J. stated the rule to be that "words of general exemption from liability are only intended (unless the words are clear) to relieve the carrier from liability where there has been no misconduct or default on his part or that of his servants." In my opinion these general words if read with their context are clear. That this artificial rule of construction did not, in the opinion of *Bowen* L. J., wholly supersede the general rules of construction which require the whole contract to be read together and effect given as far as possible to every stipulation, and general words to be construed in the light of their context, I think, may be gathered from the fact that he was at pains to point out that the exception of negligence in that case did not affect the construction of the general words under construction which dealt with theft, as that was a case of wilful default not covered by the exception of negligence. Similarly in *The Pearlmoor*[2], Sir *Gorell Barnes* when applying the judgment of *Walton* J. to the interpretation of the general words then in question relied on the fact that in that particular bill of lading negligence was only excepted in certain specific cases and not generally, to show that general words not relating to any of those specific cases could not be read as exempting from liability for negligence. In *British India Steam Navigation Company* v. *Ratansi*[3] which came before Sir *Charles Farran* a bill of lading of the present defendants and very much in the present form contained an additional clause now omitted: "if stored in receiving ship, godown or upon any wharf, all risks of fire, dacoity, vermin *or otherwise* shall be with the merchant," and it may well have been held that these words relating to the stage when the shipowner is in possession as warehouse-keeper and enumerating the specific risks which the merchant was then to bear did not exempt the carrier from liability for negligence merely because the general words "or otherwise" were added to the specific risks which the merchant was to bear at this stage. That decision, in my opinion, comes within the rule now laid down by the House of Lords that an ambiguous document is no protection.

1. (1891) I. Q. B. 619. 2. (1904) P. 286.
3. (1896) I. L. R. 22 B. 184.

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On the whole I have come to the conclusion that in this bill of lading the carriers have sufficiently protected themselves from liability for the negligence of their servants during the discharge of the cargo. To hold that these general words of exemption have the effect of imposing upon the carrier a liability for negligence appears to me, with great respect, to be carrying this doctrine of artificial construction further than it has ever yet been carried and further than it ought to be carried. I am confirmed in this view by the recent decision of the House of Lords in *Nelson Line (Liverpool) Limited* v. *James Nelson & Sons, Limited*,[1] the report of which has reached India since this judgment was written. Their Lordships in that case consider the effect of a clause exempting the shipowner from any damage or detriment to the goods which could be covered by insurance, words in effect the same as those considered by *Walton* J. in *Price & Co.* v. *Union Lighterage Company*[2], but not standing by themselves as in that case but occurring in a bill of lading in the midst of other complicated and not altogether consistent stipulations. In the Court of Appeal the case was held to be governed by the rule laid down by *Walton* J. in *Price & Co.* v. *Union Lighterage Company.*[2] Lord *Loreburn* remarked that the words taken by themselves seemed to excuse the shipowner from any imaginable liability except such as could not by law be underwritten. But, his Lordship went on to observe, these words must be considered along with the context, and considering them along with the other provisions he found it impossible to ascertain what was the intention of the parties, and then explicitly rested his decision on the ground that an ambiguous document is no protection. His Lordship, however, went on to make certain other observations in the light of which *Walton* J's decision and those that have followed it will have to be reconsidered. "I cannot agree in the contention that there is a canon of construction by which the rigour of interpretation in some commercial documents must be proportioned to the importance of the stipulation to be construed. I know of only one standard of construction, except where words have acquired a special conventional meaning, namely, what do the words mean on a fair reading, having regard to the whole document?"

1. (1908) A. C. 16.

2. (1903) I. K. B. 750.

Applying this standard to the present case I fail to see any element of doubt.

The remaining point is whether there are sufficient grounds to justify this Court on second appeal in setting aside the finding of the lower appellate Court and giving judgment for the plaintiff. Now the suit is brought in respect of 246 bags of rice out of 4,000 bags belonging to the 1st plaintiff which were carried on board a steamer chartered by the defendants from Rangoon to Tuticorin. The plaintiff alleges that they were not delivered, but were landed in hurry and confusion and became damaged and unfit for consumption by exposure to heavy rain at Tuticorin without being covered and that they were consequently destroyed by local municipal authorities whilst in the custody of the defendants 2 to 4, the agents of the 1st defendant, the British India Company. Now the lower appellate Court has found that the defendants were not guilty of negligence in allowing the bags to get wet, and, secondly, that the damage to the bags was not in fact caused by their getting wet but was due to the length of time they were left on the foreshore by the consignees or their agents. Either of these findings is sufficient to dispose of the plaintiffs' suit, and I see no sufficient reason for differing from either of them. But before coming to them it is important to see on the facts found by the lower appellate Court or admitted, what was the custom of the port as to the landing of grain cargo. As to the customary manner of landing grain cargo, when the landing is undertaken by the ship, it is found that the custom which was observed in this case was for the ship to put the bags into boats and to carry them from the steamer which cannot get within some miles of the shore to the jetty and to discharge the bags unsorted on the jetty, and then to remove the bags from the jetty and to sort them according to marks on the foreshore when they are at the disposal of the consignee. Now this, in my opinion, has a very important bearing in the present case, as when the consignee's agents have had notice and are on the spot the ship's liability even apart from the bill of lading must, in my opinion, absolutely cease when the bags are sorted and stocked and at the disposal of the consignee. BEAVEN on *Negligence in Law* (Second Edition) Vol. II, p. 1307, cites 3, Kent. Comm. 215. It is then open to the consignee to remove them or to leave them on the foreshore at his own risk and expense,

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either protected or unprotected for as long a period as suits his convenience. What he chooses to do with them is no concern of the carrier, and he cannot be called on to protect them with tarpaulins until the consignee chooses to remove them. To put the matter in another way, a shipowner or charterer cannot be bound to carry about tarpaulins for the protection of cargo after he has landed it and placed it at thed isposal of the consignees, or to keep a stock of tarpaulins for this purpose ready at the various ports at which the ship calls. It was not seriously contended that there was any such liability. This being so, as the 246 bags were admittedly placed at the disposal of the consignees on the foreshore and were not seized and destroyed by the Municipality until three or four days later, the plaintiffs' claim, in my opinion, is not so much for non-delivery of the bags as for failure to deliver them in good order and condition and must be so dealt with.

If this be so, the only question is : Was the loss of these 246 bags due to damage received owing to the defendants' negligence during the landing and before they were sorted and stocked and at the plaintiff's disposal on the foreshore? Now it is stated by the late Mr. *Carver*, S. 461, that "the manner of discharging also is, in the absence of special terms, to be determined by reference to the regulations and practices of the port of discharge," and I do not see how a shipowner or charterer who takes power to land cargo at the port of discharge at the consignee's risk can well be expected to take any greater precautions for the safety of the cargo than are usual and customary at the port. What is usual and customary in such a case is a good index of what is reasonably necessary for safety. Here the lower appellate Court has found that there was no custom at Tuticorin to protect grain cargo during landing with tarpaulins during the rainy reason, and, under these circumstanses, I do not see how we can be justified in interfering with the finding that there was no want of reasonable care in failing to protect them.

I think, further, that the conclusion to be drawn from the lower Court's findings is that the lengthy exposure to which some of the bags were subjected during transit in this case was due to exceptional circumstances which the defendants could not reasonably be expected to have foreseen—responsibility for which lay not with the defendants but very largely with the 2nd and 3rd

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plaintiffs, the agents whom the 1st plaintiff employed to take delivery of his consignment. Of the whole cargo of over 38,000 bags, plaintiffs 2 and 3 together had to take delivery of 22,500 bags including the 1st plaintiff's 4,000, that is to say, considerably more than half. On Wednesday the 24th October, the day of the ship's arrival, they and the other consignees received a notice Exhibit I, from the Company's agent at the port requesting them to take delivery of the cargo day by day as landed, as the space for landing on the foreshore was very limited, and pointing out that cargo left on the beach would be at the consignee's entire risk and expense A portion of the foreshore, it appears, was covered with Government salt for export, and so unavailable for the grain cargo. The necessity for prompt action on the part of the consignees was all the greater, as the monsoon or rainy season might be expected to set in any day. Notwithstanding, according to the figures in Exhibit IV, which the lower appellate Court has accepted, the 2nd and 3rd plaintiffs and other consignees did not remove a single bag on Wednesday or Thursday and only removed between five and six thousand bags on Friday and Saturday, so that on Saturday night there were over seventeen thousand bags ready for removal on the foreshore and the congestion there was so great that the defendants were unable to go on removing bags from the pier and sorting them on the foreshore, and on Saturday night the whole pier was covered with unsorted bags which had been discharged in the ordinary course from the ship and could not be sorted for want of room on the foreshore. On Saturday night the monsoon burst and such of the 17,000 bags on the foreshore and of the bags on the pier as were unprotected were exposed to the rain. On Sunday the ship suspended discharge at the request of the consignees, but the consignees removed 7,000 bags and 5,000 more were removed from the jetty. On the morning of Monday, the 29th, there were 14,000 ready on the foreshore and two of the pier jetties were still covered with bags. The bags left on the foreshore by the consignees were obviously exposed to greater risk of damage than those on the pier owing to the possible effects of heavy rain on the foreshore. According to Exhibit IX, it was the bad smell coming from the bags actually lying in the mud on the foreshore that led to the intervention of the Municipality on Monday, October 29th, when the Sub-Collector was brought down and

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examined the bags on the foreshore and on the jetties and gave the consignees three days to clear them all, which the consignees undertook to do.

Then as to the question whether the damage to these 246 bags was due to wetting received before they were sorted and stocked, as to which the finding is in defendants' favour, it is argued for the appellant that there is nothing to show when these particular bags got wet or how they were damaged and that the onus is on the defendants. This being, as I have said, really in the nature of a claim for failure to deliver in good order and condition, and delivery in the sense of putting these bags at the consignee's disposal being admitted, I think if the consignees wished to make a claim against the defendants for a total loss owing to the wet condition of the bags when put at their disposal, it was for them to show the time when the bags were put at their disposal, and that the condition of the bags when put at their disposal was such as to justify them in refusing to take delivery, or in afterwards rejecting these bags. This onus they have failed to discharge.

But even putting the onus on the defendants and assuming the case most favourable to the plaintiffs, *viz.*, that these particular bags were exposed on the jetty from Saturday night, I still think there is evidence to support the finding that these bags were damaged not by the wetting but by exposure on the foreshore for which the consignees are alone responsible. The Sub-Collector's action certainly goes to show that the bags which had been exposed on the pier had not sustained any serious damage on Monday morning and would have been all right if the consignees had removed them within three days as they undertook to do. That they had ample opportunity of removing them even earlier is shown by the figures in Exhibit IV, which the lower appellate Court has accepted. On Monday the consignees removed no less than 12,000 bags, leaving a balance of only 2,700 out of the 14,000. awaiting removal on that morning. A further 3,000 had been removed from the jetties and sorted that day, making 5,700 ready on Tuesday morning. If they had gone on at the same rate as on Monday they could have removed on Tuesday not only this 5,700, but also the greater part of the 4,600 sorted that day. The last of the bags so left on the pier on Saturday night must have been sorted and ready for removal on Tuesday when the ship

completed her discharge and left the port, as the pier would have been cleared in the ordinary course to make room for the landing of further bags. But for some reason on Tuesday the consignees chose to remove 1,100 only leaving over 9,000 ready. The last 3,000 or so were sorted on Wednesday, October 31st, but the consignees only removed 3,000 on that day leaving 9,000, and of these they afterwards removed 8,000 leaving 1,098 (including the 246 which are the subject of this suit), which were seized by the Municipality on the 2nd or 3rd November. I am not called upon to suggest why the consignees were so slow in removing the bags after Monday, but I think the District Judge was justified in view of the above facts in finding that the damage to these bags was not due to the wetting but was due to the length of time they were left on the foreshore. If the 1st plaintiff's bags were left on the foreshore that was obviously due to the action of the two agents he employed to take delivery, the 2nd and 3rd plaintiffs, and the defendants cannot be held responsible. But, as I have already said, even assuming the damage was caused to these bags by the wetting they received before they were placed at the disposal of the consignees, still I think the District Judge was justified in finding that failure to have tarpaulins ready and to protect the bags with them did not in the circumstances amount to negligence. I am, therefore, of opinion that on the findings and admissions there is no ground for setting aside the findings in favour of the defendants, and I am of course even more strongly of opinion that there are no grounds to justify us on second appeal in arriving at fresh findings in favour of the plaintiffs.

I would, therefore, dismiss the appeal with costs, but the decree must be in accordance with the opinion of the majority of the Court.

Sankaran Nair J.—I agree with my Lord the Chief Justice in holding that the loss to the plaintiff was caused by the negligence of the defendants' servants. Of the 1,098 bags destroyed, 246 belonged to the plaintiffs, and there is no evidence to show that they were ever ready for delivery by being separated from the rest and, if they were, when.

The second question is whether the defendants are exempted from liability by the terms of the bill of lading. On this question also I concur in the judgment of my Lord the Chief Justice. Briefly my reason is this:—

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Sankaran Nair J.

Prima facie the defendants are liable for the negligence of their servants. They have to make out exemption from liability and that can only be made out, if at all, by showing that the plaintiffs agreed to discharge them from it. It is not enough to use words which were intended by them for that purpose or which would ordinarily be regarded as exempting them. The cargo owner knows that the law makes the Company liable, and he must therefore be told in clear and plain language and in explicit terms that they do not hold themselves liable to him for their servants' negligence to make up his mind whether under such circumstances he would ship his cargo or not. It must not be left to inference. Unless his attention is drawn to it, he is not to be presumed to discharge the shipowner. In the case before us, the negligence clause in the body of the bill of lading does not operate after the goods leave the ship's tackle and the clause or condition inserted later in the bill does not refer to negligence. On these findings the plaintiffs are entitled to a decree in their favour and it is not necessary to decide the other question raised by Mr. *Sundara Iyer* that a contract exempting the shipowner from the negligence of himself or his servants cannot be enforced in this country. Mr. Justic *Subrahmanya Aiyar* has left the question open. Mr. Justice *Miller* was not prepared to dissent from the decisions in which similar stipulations were treated as legal. My learned colleagues who have heard this appeal have also expressed their opinion on this point. I proceed accordingly to consider the question. As to the authorities, the cargo owner was not represented in the case *Jellicoe* v. *The British India Steam Navigation Co.*[1] and there is no doubt in my mind on reading the judgment of the Chief Justice in that case and in the case *Moothora Kant Shaw* v. *The India General Steam Navigation Co.*,[2] that he arrived at his conclusion with evident reluctance. Neither in *Hassanbhoy Visram* v. *The British India Steam Navigation Company, Limited*,[3] nor in *Hajee Ismail Sait* v. *The Company of The Messageries Maritimes of France*,[4] was the illegality of the stipulation raised or discussed. The question, therefore, is not concluded by authority.

The rule of law in England which may now be taken to be established by the decisions referred to by Mr. *Napier* and on

1. (1884) I. L. R. 10 C. 489.
2. (1883) I. L. R. 10 C. 166.
3. (1889) I. L. R. 18 B. 571.
4. (1905) I. L. R. 28 M. 400.

which he relies is thus stated in CARVER'S *Carriage by Sea* S. 101—

"Bills of lading now commonly relieve the shipowner from responsibility for negligence of the master or mariners in navigating the vessel. Often the exeption extends to acts of stevedores, and other persons employed by the ship; and sometimes it goes still further, and covers all wrongful acts, and neglects, and errors in judgment, whether of the owners, or of those in their service, or for whose acts they would otherwise be liable. There is nothing in our law to prevent the parties from making such a contract. The Legislature has not interfered with shipowners, as it has with railway companies, to prevent their enforcing contracts which may seem to the Courts not to be reasonable."

In Indian law there is, of course, nothing like an unenforceable contract, as only an agreement enforceable by law is a contract. Assuming then that a shipowner can enter into an agreement with the cargo owner as stated above, can it be possibly contended that we are to enforce in this country, the English law of contract even where it differs from the Indian law? The validity of the agreement must be determined by the Indian law, and the fact that the parties stipulate to be bound by the agreement is of no avail, except in certain cases. Thus, if in making the contract there was no consent, *i.e.*, the shipowner and the other party "did not agree upon the same thing in the same sense" or if the agreement was brought about by fraud, undue influence, coercion, or misrepresentation, then there is no valid agreement or contract which an Indian court will enforce even though the parties may state in clear, express and unequivocal terms, that each party shall, in spite of any such invalidating element, perform such contract. No words can take the case out of the operation of the rule of law or exempt the party from liability for damages.

Similarly, if the consideration or object of the agreement is opposed to public policy as declared by the Indian Legislature or the Indian Courts, no words in a contract will estop a party from pleading, or the Courts from deciding, that the contract cannot be enforced. It makes no difference, so far as I am aware, in India that it was the agent who was guilty of the particular act which invalidates the contract.

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Let us then test the validity of this exemption clause by the Indian Contract Act.

S. 148 of the Indian Contract Act, as pointed out by the Judicial Committee in *The Irrawaddy Flotilla Company* v. *Bugwandas*,[1] undoubtedly includes bailment for carriage. This is also the view of the Calcutta High Court in *Mackillican* v. *The Compagnie Des Messageries Maritimes De France*,[2] and of the Bombay High Court in *Kuverji Tulsidas* v. *The Great Indian Peninsular Railway Company*[3]. A shipowner is a bailee within the terms of that section. Under S. 151 of the Act, the defendants, therefore, are bound to take as much care of the goods as a man of ordinary prudence would under similar circumstances. It is only the incident of any contract not inconsistent with its provisions that remains unaffected by the Contract Act (see S. 1 of the Contract Act). The incident of the contract before us, that the bailee is exempt from taking the care required by S. 151, appears to me to be clearly inconsistent with that section. S. 152 seems to make this clear. It declares that the bailee's liability is limited as declared by S. 151, "in the absence of any special contract", or in other words, he may by contract undertake a higher responsibility, for instance, that of an insurer. The Calcutta High Court and the Judicial Committee relied upon this section to hold that these provisions do not limit the liability imposed by the common law rule recognized in the Carriers Act, 1865, which was the only point decided in that case. The provision in S. 152 that a bailee may undertake a higher responsibility, the absence of a similar provision that he may limit the liability imposed by section 151, and the fact that in Chap. IX relating to Bailment whenever a rule of law is intended to operate only in the absence of a contract to the contrary it is expressly so stated— see Ss. 163, 165, 170, 171 and 174 —leave no doubt in my mind that a bailee's liability cannot be reduced by contract below the limit presciibed by S. 151. In fact, throughout the Act, whenever the Legislature intended that the provisions of the Act should be enforced only in the absence of a contract between the parties they have said so. See Ss. 109, 113, 116, 121, 93, 94, 95, 202

1. (1891) I. L. R. 18 C. 620 at p. 627. 2. (1880) I. L. R. 6 C. 227.
3. (1878) I. L. R. 3 B. 109.

219, 221, 230, 241, 253, 256, 261, 265. The obligation imposed by S. 151 applies to bailees as well as to their servants in the discharge of their duty. The agent represents the bailee under the Act. The Contract Act thus sweeps away all the distinctions between the degrees of care required of the bailees. In the English law the amount of care required seems to depend upon the benefit accruing to the bailee. Under the Contract Act the obligation arises from the simple fact of accepting delivery or receiving property for a certain purpose and the care to be taken is the same in all cases. Thus, under S. 71, a person undertakes the same responsibility as a bailee from the mere fact of taking goods belonging to another into his custody. The relations between parties may well be left to be regulated by contract when the degree of care required is dependent upon the benefit derived from the bailment, but when the same amount of care is required independent of any benefit to the bailee, then it may well be that the Legislature did not think it right to allow the bailee to reducehis liability.

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Assuming then that the rule of English law that a common carrier can get rid of his liability by contract has been accepted in India, the contract itself must be obviously one which will be recognized in the Indian Courts, and, if I am right in the view above set forth, it necessarily follows that while a common carrier may exempt himself from the liability of an insurer by contract, he cannot exempt himself from the liability of an ordinary carrier imposed by S. 151 of the Indian Contract Act.

Further, let us see whether there is any consideration for the exemption. The English common law is stated in these terms by Lord *Blackburn*:—"At the common law, a carrier who received goods as such was responsible for every injury occasioned to them by any means except the act of God or of the Queen's enemies. He was also bound to receive goods tendered to him for carriage and was liable to an action if he refused to receive them without reasonable excuse and such an action might still be maintained."

For any agreement to relieve the common carrier from this responsibility under the common law for negligence, among other things there must be consideration In this case what is the consideration? Not the undertaking to carry cargo. Because the defendants as common carriers are bound on payment of

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freight to receive and carry it to its destination. Is it then the special rate at which this cargo was to be conveyed? I agree that the reasonableness of the freight will depend upon various conditions such as weight, measurement or value. It is unreasonable to expect a shipowner to carry goods worth a few rupees and jewels possibly worth lacs for the same remuneration; the negligence of his servants in the one case may cause him only a trifling loss while in the other case it might be his ruin. It is only right, therefore, that he should be entitled to demand higher rates for certain goods, subject to this condition, that they must not be prohibitive rates intended to coerce the owner to accept any conditions the shipowner might think it fit to impose. In such cases the shipowner may tell the owner, we will undertake the risk only if you pay the higher rate. Otherwise we undertake no risk. Similarly, according to some English cases, if the shipowner is willing to carry cargo for below what would be a reasonable remuneration for carrying it at his risk on condition that he is to have no liability at all and the owner agrees to the reduced rates discharging him from the common law liability there may be an agreement with a good consideration—see *Peek* v. *North Staffordshire Railway Company* [1]. I doubt, for the reasons already pointed out, whether this is permissible under the Indian Contract Act. But in any event, it is for the shipowner to offer the alternative rates for the owner to make his election. It cannot be said in this case then that the plaintiffs elected to pay a lower rate on condition that the defendants are not to be liable for their servants' negligence.

The other conditions in the bill of lading also require notice. There is a clause that packages of more than a certain weight are only carried at advanced rates of freight and by special agreement. There is another clause which requires that for gold, precious stones, etc., over the value of Rs. 500, special shipping order or advice note must be granted after a declaration of their value. This appears reasonable. But I can see no consideration for a stipulation that the Company will not be responsible for negligence, even after receiving the higher freight for the greater care required on account of the nature of the goods. The agreement therefore, so far as this stipulation is concerned, is without consideration.

1. (1862) 10 H. L. C. 472.

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I have assumed throughout that it is open to the shipowner, as common carrier, to enter into a contract of exemption from liability, if such contract is for consideration and is not opposed to the Indian Law of Bailment. I now proceed to consider the other question whether the common law liability of a common carrier may be limited by contract in India.

In deciding whether the English law to this extent has been followed in India, it is necessary to bear in mind that it makes no difference whether the exception relates to the negligence of the master or his servants; that the stipulation may be admittedly unreasonable; and that the liability of a shipowner in cases similar to the one before us is the same as that of an inland common carrier.

Whenever I refer to negligence, I mean negligence in not taking reasonable care or the care required by S. 151 of the Indian Contract Act.

How far this common law liability could be modified by contract between the parties was stated by Mr. STORY in his book on *Bailments*, S. 549, published in 1832. "It was," he says, "formerly a question of much doubt, how far common carriers on land could by contract limit their responsibility, upon the ground, that, exercising a public employment, they are bound to carry for a reasonable compensation, and have no right to change their common law rights and duties, and it was said, that, like innkeepers, they are bound to receive and accommodate all persons, so far as they may, and cannot insist upon special and qualified terms. The right, however, of making such qualified acceptances by common carriers seems to have been asserted in early times. Lord *Coke* declared it in a note to *Southcote's Case*[1], and it was admitted in *Morse* v. *Slue*[2]. It is now settled and recognised beyond all reasonable doubt. Still, however, it is to be understood, that common carriers cannot, by any special agreement, exempt themselves from all responsibility, so as to evade altogether the salutary policy of the common law. They cannot, therefore, by a special notice, exempt themselves from all responsibility in cases of gross negligence, or fraud; or, by demanding an exorbitant price, compel the owner of the goods to yield to unjust and oppressive

1. 4 Co. Rep. 84.

2. 1 Vent. R. 238.

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limitations of his rights. The carrier will also be equally liable in case of the fraud or misconduct of his servants, as he will be in case of his own fraud or misconduct."

In the opinion of Lord *Blackburn* "the weight of authority was in 1832 in favour of this view of the law."

STORY defines "gross negligence" to be the want of such care as a prudent man would take of his own property (S. 11). *Best* J. in *Batson* v. *Donovan*[1], and *Dallas* C. J. in *Duff* v. *Budd*[2], give a similar definition, or, in other words, the degree of care is similar to, if not the same as, that required to be taken by a bailee by S. 151 of the Indian Contract Act.

The Carriers Act of 1830 enabled the inland common carriers to exempt themselves from liability by special agreement, and as there was no reason to treat carriers by sea differently from the carriers by land, the Judges held that they came within the reason of the statute and were therefore similarly entitled to enter into contracts of non-liability. Let us see how these questions have in the meantime been dealt with in India.

The corresponding Indian Act is the Common Carriers Act of 1865 based mainly on the English Act of 1830. Before 1865, there was Act 18 of 1854 relating to Railway Companies, and it may be noticed that the right of limiting their liability by private contract even when such contract was reasonable was not given to them as in the case of English Railway Companies by the corresponding English Statute passed about the same time, and the companies were expressly made answerable for the gross negligence or misconduct of their servants. The earlier sections of Act III of 1865 extend to India the principles embodied in the English statute of 1830 relating to carriers S. 6 of the Act, like S. 6 of the Statute, declares that common carriers may limit their liability by contract with the important limitation that in the case of an agent of the owner of the goods he must be duly authorized in that behalf. This deviation from the English law was made to prevent common carriers from securing the signature of the cooly to what may afterwards be pleaded as a contract against the owner. Then we have the two important sections which I place below side by side for contrast and comparison.

1. (1820) 4 B. and Ald. p. 30.
2. (1822) 3 Br. and Bing. p. 182.

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S. 8 (*Cap.* 68) *of XI Geo. IV & I Will. IV.*

Provided also, and be it further enacted, that nothing in this Act shall be deemed to protect any Mail contractor, Stage Coach Proprietor, or other common Carrier for Hire from liability to answer for loss or injury to any goods or articles whatsoever arising from the felonious acts of any Coachman, Guard, Book-keeper, Porter, or other Servant in his or their employ, nor to protect any such Coachman, Guard, Book-keeper, or other Servant from liability for any loss or injury occasioned by his or their own personal neglect or misconduct.

S. 8 *of Act III of* 1865.

Notwithstanding anything hereinbefore contained, every common carrier shall be liable to the owner for loss of or damage to any property delivered to such carrier to be carried, where such loss or damage shall have arisen from the negligence or criminal act of the carrier or any of his agents or servants.

It is difficult for any one to read these two sections without coming to the conclusion that it is an emphatic repudiation by the Legislature of the doctrine of English law that a common carrier may exempt himself from liability for the negligence of his agents or servants. If we follow the process of reasoning adopted by the English Judges and apply to the Steamship Companies the rules of law declared applicable to inland common carriers, there is no reason why this principle embodied in Act III of 1865, S 8, should not be applied to them as a rule of justice and equity. It is impossible to hold that the law of common carriers *in this respect* is the same in India as in England. When the Madras Government suggested that the Railway Companies in India might be allowed the same liberty as in England to enter into reasonable contracts, it was the opinion of STORY quoted above and the American law that was expressly relied upon by Sir *Henry Maine* for not following the English law. The rule of English Common law adopted in India before 1865 was, as stated by the *Chief Justice* and *Mitter* J. in *Moothora Kant Shaw* v. *The Indian General Steam Navigation Co.*[1] the rule

1. (1883) I. L. R. 10 C. 166.

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which imposes upon the common carrier the liability of an insurer. There is nothing to show that the right of exemption by contract was ever recognised. It was the attempt of the common carriers to do so that led to this legislation. Is there any reason why in the absence of any legislation a different rule should be applied to carriers by sea in deviation of the course followed by the English Judges? If we adopt the conclusion of *Brett* J. in *Liver Alkali Co.* v. *Johnson*[1], and *Nugent* v. *Smith*[2], that the law relating to the shipowners who carry goods for hire whether by inland navigation or abroad is based upon a custom which he traces to Roman law by which no insurer's liability attached to carriers by land, then we may possibly be justified in treating such carriers on a different footing. But this view has been strongly dissented from by *Cockburn* C. J. in the Court of Appeal in *Nugent* v. *Smith*[3] and is not now accepted. On the other hand, it is now settled beyond doubt that the liability of a shipowner is the same as that of a common carrier.

I am, therefore, of opinion that the English common law that has been accepted in India is the law as declared by STORY and Lord *Blackburn* which is based on grounds of public policy applicable alike to England and India; that its further development as to exemption by contract due to the Carriers Act of 1830 for loss due to negligence has not been accepted in India but on the other hand has been declared inapplicable by Act III of 1865 to the cases falling within that Act, and following the reasoning of the Privy Council that though an Act may be inapplicable it ought to be followed as a rule of justice, equity and good conscience, in cases similar to those dealt with by the legislature in the absence of any circumstances to the contrary, the principles embodied in Act III of 1865 ought to be followed. I am further of opinion that a rule of English common law ought not to be followed when it is opposed to the principles followed and acted upon by the Indian Legislature.

The next question is whether the contract exempting a shipowner from the consequences of the negligence of himself or his servants in not taking reasonable care or the care referred to in S. 151 of the Indian Contract Act is opposed to public policy and is therefore void. See S. 23, Indian Contract Act.

1. (1874) L. R. 9 Ex. 338. 2. (1875) 1 C. P. D. 19.
3. (1876) 1 C. P. D. 423.

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I have already pointed out that I can see no consideration for this stipulation. It has been held to be unreasonable in the case of Railway Companies—*Peek* v. *North Staffordshire Railway Company*[1]—and in CARVER'S book it is admitted that the contract need not be reasonable. If the obligation is imposed upon a common carrier for the benefit of the public, he cannot claim exemption by virtue of an unreasonable stipulation. The reason why a common carrier is bound to receive goods tendered and the great responsibility of an insurer is imposed upon him is that necessity compels the owners of goods to trust him. This liability is imposed upon him, in the words of Lord *Mansfield*, "to prevent litigation, collusion and the necessity of going into circumstances impossible to be unravelled." As *Best* C. J. puts it in *Riley* v. *Horne*[2]: "When goods are delivered to a carrier, they are usually no longer under the eye of the owner.... If they should be lost or injured by the grossest negligence of the carrier or his servants, or stolen by them, the owner would be unable to prove either of these causes of loss; his witnesses must be the carrier's servants, and they, knowing that they could not be contradicted, would excuse their masters and themselves." For the above reasons it is essential that common carriers must, in India also, be subject to the English common law liability, and the Privy Council have now placed the matter beyond dispute. Where the obligation is imposed upon the common carrier for the benefit of the public he cannot get rid of that obligation by agreement if it is not reasonable. The Act III of 1865 has declared that the common carriers governed by that Act should not be allowed to claim exemption for negligence by contract and so far as they are concerned any such provision would be illegal. If the English law applies, a shipowner may get the signature of a cooly who brings the goods, to any document which will be treated as binding on the cargo-owner and this in express terms is prohibited by Act III of 1865.

The reasons given above by Lord *Holt*, Lord *Mansfield* and *Abbot* C. J. are, it appears to me, conclusive to show that it is against public policy to allow a claim for exemption as the one now put forward. There is practically no freedom of choice, and persons when entrusting shipowners with their property are obliged to accept any condition that may be imposed upon them by the

1. (1862) H. L. C. 472. 2. (1828) 5 Bing. 217 at 220.

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steamship companies. The cargo-owners have no control over the servants and it is only right that the master and not the cargo-owner should suffer for the misuse of his powers by the servant as he has armed him with those powers. The law which requires care and diligence on the part of a carrier will otherwise be illusory in the case of steamship companies as everything is left to the servants. There will be a tendency to lax supervision over the servants and to make their selection dependent more upon cheapness than on efficiency. I fully agree with the learned Chief Justice of Calcutta that if the defendants are right the law renders it practically impossible in the great majority of cases to fix the carriers with any responsibility. Nothing is more easy than for the carriers to call their servants as witnesses and to prove *primâ facie* that the goods were protected in the usual way. It would then be impossible for the plaintiff to bring negligence or criminality home to the carriers although the goods may not be forthcoming and no explanation given how the loss occurred.

I am quite alive to the fact that, if possible, we ought to follow the English law in this respect.

There are only two reasons given by *Phillimore* J. in "*The Duero*"[1] for deciding in favour of the legality of the contract. The first is that a lower freight might have been paid on account of this exemption. I have already discussed that question, and as a matter of fact it does not appear to be so in this case. The second reason is that the cargo-owner might have got his goods insured. This reason is not applicable where there is no general system of insurance. Further, that an insurer may exempt himself from liablity as the cargo-owner could insure elsewhere appears to me, with all respect to the learned Judge, not a satisfactory reason.

It has also to be remembered that the English law attaches an importance to freedom of contract which is not recognized in India where people are accustomed to have their relations regulated not by contract but by law to a greater extent than in England. Holding the view that such an agreement is unreasonable the English Judges construe the terms of every agreement very strictly against the shipowner. The rule has not been accepted in America. The Indian law on Bailments is not the same as the English law on

1. (1869) L. R. 2 A. & E. 393.

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a material and relevant point. The Common Carriers Statute of 1830 is different in this respect from the Common Carriers Act of 1865. In the Liverpool Bill of Lading of 1882, the Hamburg Bill of Lading of 1885, and London Conference Rules of Affreightment 1893, exemption from loss arising from negligence in the cases referred to therein were allowed, but not in a case like the one before us. So too in the forms adopted in the Mediterranean, Black Sea and Baltic trades and in the New York trade respectively in 1885, in each case after long negotiations in which both merchants and shipowners are alleged to have taken partly.

Such an exemption clause is, therefore, clearly against the interests of the mercantile community and not necessary in the interests of shipowners.

I am of opinion, therefore, that it is against public policy to enforce this stipulation and that it must be left to the Legislature, if necessary, to introduce a rule of law, held unreasonable in England and utterly unsuited to the conditions of this country.

I would, therefore, allow the appeal with costs throughout and that if the parties cannot agree as to damages the case should go back to the Court of first instance in order that damages may be assessed.

The judgments of the *Chief Justice* and *Sankaran Nair* J. prevail.

The Letters Patent Appeal was again posted '*To be spoken to*' before the *Chief Justice* and *Sankaran Nair*, J. [1] with reference to the question of damages, and the Court delivered the following

JUDGMENT :—As the parties are unable to agree as to damages the case must go back to the lower appellate Court for a finding as to damages, the lower appellate Court to be at liberty, if it thinks fit, to remit the case to the Court of first instance for the purpose of assessing the damages.

Fresh evidence may be taken. The finding should be submitted within three months from this date and seven days will be allowed for filing objections.

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1. 28th July 1908.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Benson and Mr. Justice Boddam.

The Crown .. Appellant.*

v.

Ramaswami Konan .. Accused.

Public Prosecutor v. Ramaswami Konan

Penal Code, S. 224—Escape from lawful custody.

A man legally arrested for an offence must submit to be tried and dealt with according to law. If he gains his Liberty before he is delivered by due course of law, he commits the offence of "escape," even when the escape is effected by the consent or the neglect of the person that kept the prisoner in custody. [*Queen Empress* v. *Muppan*[1] *followed.*]

Appeal under S. 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused in Calendar Case No. 815 of 1907 by the Stationary 2nd Class Magistrate of Tiruvannamalai.

The Public Prosecutor (*E. B. Powell*) for the Crown.

Accused *not represented.*

The Court delivered the following

JUDGMENT :—We are unable to accept the view taken in the case quoted from Weir's Law of Offence, Vol. I, page 202, and relied on by the Sub-Magistrate. We take it that the law is correctly stated in the case of *Queen Empress* v. *Muppan*[1] in the following terms :—

"A man legally arrested for an offence must submit to be tried and dealt with according to law. If he gains his liberty before he is delivered by due course of law, he commits the offence of 'escape.' It has been long established that even when the escape is effected by the consent or the neglect of the person that kept the prisoner in custody, the latter is no less guilty, as neither such illegal consent nor neglect absolves the prisoner from the duty of submitting to the judgment of the law (1 Russ. 5th Edition p. 567; Roscoe, 11th Edition. p. 453; and Bishop's Criminal Law 7th Edition, S. 1104)."

The fact that the peon who had the custody of the accused went to sleep, did not, in any way, put an end to the custody, or affect the accused's duty to submit to the judgment of the law.

We must, therefore, set aside the acquittal and direct the Sub-Magistrate to restore the case to his file and to try it afresh in accordance with law.

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* Cr. A. 153 of 1908. 1. (1895) I. L. R. 18 M. 401. 7th April 1908.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Benson and Mr. Justice Miller.

In re Gangi Reddi Buchanna and others .. Prisoners* 1 to 4 (*Appellants.*)

In re. Gangi Reddi Buchanna.

Cr. P. C., S. 297—Charge to Jury—Misdirection—Omission to refer to the plea of accused or to the evidence bearing thereon.

Omission by the Judge to refer to the plea of *alibi* of the accused and to the evidence bearing on the plea in his charge to the Jury is a misdirection, and the accused are entitled to be retried.

Appeal from the sentences of the Court of Session of the Kurnool Division in Case No. 49 of the Calendar for 1907.

Dr. S. Swaminathan for appellants.

The Public Prosecutor (*E. B. Powell*) for the Crown.

The Court delivered the following

JUDGMENT:—In this case the appellants have been convicted by a jury, but we must set aside the verdict as there has been a serious misdirection in the Judge's charge to the jury.

The plea of all the accused was an *alibi*, and each of the accused, except the first, called witnesses to prove the *alibi*. Nine witnesses for the defence were examined, but the Sessions Judge in his charge to the jury has not referred to them at all; nor has he even stated what the plea of the accused was. It is impossible to say that this is not a misdirection which prejudiced the accused.

We set aside the conviction and direct that the accused be re-tried in accordance with law.

IN THE HIGH COURT OF JUDICATURE AT MADRAS

Present:—Mr. Justice Wallis.

Musthan Rowthar .. Petitioner† (*Defendant*).
v.
Natharsa Rowthar .. Respondent (*Plaintiff*).

Musthan Rowthar v. Natharsa Rowthar.

C. P. C., S. 156—Conditional order of adjournment—Decree on failure to pay costs, bad.

The Court has no jurisdiction to pass an order of adjournment conditional on payment of costs so as to enable it to pass a decree in favor of the party other than the one applying for adjournment in default of payment of those costs.

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* C. A. No. 72 of 1908. 22nd April 1908.

† Cr. R. P. No. 507 of 1906. 18th November 1907.

Musthan Rowthar v. Nathaisa Rowthar.

Petition under S. 25 of Act IX of 1887 praying the High Court to revise the decree of the Court of the District Munsif of Trichinopoly in S. C. S. No. 604 of 1906.

K. Ramachandra Aiyar for petitioner.

The Advocate General (*P. S. Sivasawmy Aiyar*) for respondent.

The Court delivered the following

JUDGMENT :—The District Munsif adjourned the case under S. 156 of the Civil Procedure Code, and under the same section ordered the defendant to pay the costs of the adjournment. The fact that the defendant did not pay the costs did not entitle the District Munsif to give judgment for the plaintiff without hearing the evidence. The order of the adjournment passed by him was not conditional, and he has no jurisdiction under S. 156 to pass an order conditional upon payment of costs such as is provided in S. 373 of the Civil Procedure Code. I set aside the decree, and direct the District Munsif to restore the case to his file and dispose of it according to law. Costs will abide.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Wallis and Mr. Justice Munro.

Mahomed Mahomed Khan Bahadur .. Appellant*
(*Counter-Petitioner, Judgment-debtor No.* 1).

v.

Mahomed Munawar Sahib .. Respondent
(*Petitioner, Transferee-decree-holder.*)

Mahomed Khan Bahadur v. Mahomed Munawar Sahib.

C. P. C., S. 258—Adjustment, in part, of decree—Validity, when not certified.

Where, after decree, an agreement is made discharging some of the defendants, the agreement is clearly in adjustment, in part, of the decree within the meaning of S. 258, C. P. C., and could not be set up in bar of execution unless certified.

Appeal from the order of the City Civil Court, Madras, in E. P. No. 373 of 1907 and C M. P. No. 1049 of 1907, connected with Suit No. 22207 of 1898 on the file of the Presidency Court of Small Causes, Madras.

G. Krishnasamy Aiyar for appellant.

K. C. Desikachariar for respondent.

The Court delivered the following

JUDGMENT.—In this case the 1st defendant, in answer to an application by the transferee decree-holder for execution

*A. A. O. No. 230 of 1907. 5th May 1908.

against him, sets up an agreement entered into between himself, the original decree-holder and the transferee decree-holder, by virtue of which the claims of the original decree-holder were satisfied and the decree was transferred to the transferee for execution against the 2nd defendant only who was no party to the agreement. The Judge of the City Civil Court held that this agreement was an adjustment of the decree within the meaning of S. 258, Civil Procedure Code, and that, as it had not been certified, it could not be set up in bar of execution.

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We agree with this decision. Under the section, if a decree is adjusted in whole or in part, the adjustment must be certified, and, unless certified, cannot be recognized. Where there is a money decree against two defendants, an agreement discharging one of them is, in our opinion, an adjustment, in part, of the decree, and so requires to be certified. In *Laldas* v. *Kishardas* [1] the agreement set up was come to before decree, and all that was decided was that the existence and validity of such an agreement should be decided in execution under S. 244, Civil Procedure Code. In *Krishnamachariar* v. *Rukmani Ammal*[2] also the agreement referred to was entered into before decree. We are not called upon to consider the effect of such agreements before decree in this case, but when, after decree, an agreement is made discharging some of the defendants, we think such an agreement is clearly an adjustment, in part, of the decree. The appeal is dismissed with costs. The order staying sale in C. M. P. No. 719 of 1908 is discharged.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present.—Mr. Justice Munro and Mr. Justice Abdur Rahim.

Valia Konikkal Edathil Cheria Panji Achan .. Petitioner* (*Plaintiff*).

v.

Marutha Veera Kavundan and others .. Respondents (*Defendants* 1 & 3).

C. P. C., S. 108—Scope of—'Ex parte' decree—Setting aside on an application of one of several defendants on sufficient cause being shown, effect of.

Panji Achan v. Marutha Veera Kavundan.

Per *Abdur Rahim* J.—In setting aside an *ex parte* decree on the application of one of several defendants, the Court has no jurisdiction to set aside the decree against

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* C. R. P. No. 186 of 1907. 26th August 1908

1. (1895) I. L. R. 22 B. 468. 2. (1904) 15 M. L. J. 370.

Panji Achan v. Marutha Veera Kavundan.

defendants other than those who have shown sufficient cause except in so far as the decree is one and indivisible.

Per *Munro*, J. :—The object of S. 108, C. P. C., is that a successful applicant should be put in exactly the same position as if no decree had been passed in the suit, and the decree must, therefore, be set aside only so far as it is necessary to achieve this object, and no further.

The decree in the case was against three defendants personally and the Devaswom property. The third defendant applied to set aside the *ex parte* decree passed against him.

Held per Curiam :—That the Court had no jurisdiction to set aside the personal decree against defendants 1 and 2 and that the decree should have been set aside only in so far as it affected the third defendant and the Devaswom property, it being competent to the third defendant to attack the decree in so far as it made the Devaswom property liable.

Petition under S. 622 of the Civil Procedure Code praying the High Court to revise the order of the District Munsif's Court of Palghat in C. M. P. No. 699 of 1906 in S. C. S. No. 361 of 1906.

V. Ryru Nambiar for petitioner.

B. Sitarama Rao for *C. V. Anantakrishna Aiyar* for respondents.

V. Ryru Nambiar :—The decree is to be set a side only so far as it is against the party applying. The words of the section seem to be clear. *Gopala* v. *Subbier*[1] is not against this view. See also *Jadubansa* v. *Mohunt Hari Cheru*[2].

B. Sitarama Rao :—Where the decree is indivisible, the whole decree is to be set aside; logical necessity requires it, *e. g.*, so far as the Devaswom property is concerned. It does not matter whether you regard a decree *prima facie* indivisible (as in *Mahmud Hamidulla* v. *Tohurenissa*[3] ; *Bhura Mal* v. *Hurkishen*[4]) or *prima facie* divisible (as in *Hurkishen* v. *Moti Chund*[5]; *Gopala* v. *Subbier*[1] ; *Jadubansa* v. *Mohunt Hari Cheru*[2].)

A joint decree against *A*, *B* and *C* is not the same as a decree against *A*+a decree against *B*+a decree against *C*. Whether a decree is really joint depends upon several considerations—upon the claim, whether joint or several; upon the defences ; upon the legal relationship between the parties ; and finally upon the decree itself. Where it is really joint and indivisible, the whole decree is to be set aside. *A* claims joint possession against *B*

1. (1903) I. L. R. 26 M. 604.
2. (1907) 6 C. L J 226.
3. (1897) I L. R. 25 C. 155.
4. (1902) I. L. R. 24 A. 383 (F.B.)
5. (1867) 8 W. R. C. R. 260.

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and *C*; both *ex parte*, a decree is given against them both. *C* alone applies to have the decree set aside. You cannot help setting aside the whole decree. This is another case where logical necessity requires setting aside the whole decree. Then again, public policy requires that, where the decree proceeds upon a common ground, the whole decree is to be set aside to avoid incongruity of decisions. See S. 544, C. P. C. and *Annamali* v. *Pitchu* [1]; *Gopala* v. *Subbier* [2]; *Bhura Mal* v. *Harkishen* [3]; *Dookhee* v. *Rajeshwari* [4]; *Brojanath* v. *Anundmoyee*.[5] See *Manek Kom Pedru* v. *Sitaram Atmaram Kagh* [6] is a case where there was a defence by one of the defendants. It is necessary to see what the defence was before we can say whether the ground is common or not.

The Court delivered the following

JUDGMENT:—*Munro* J:—The petitioner brought a suit to recover from three persons personally and as managers of a Devasthanam Rs. 27-6-0, being revenue paid by him for the defendants. The defendants did not appear, and the petitioner obtained an *ex parte* decree ordering that the defendants "personally and from the Devaswom property do pay to the plaintiff the sum of Rs. 27-6-0" with interest and costs. On application by the 3rd defendant under S. 108, Civil Procedure Code, the District Munsif set aside the whole decree as against all the defendants. The petitioner contends that the District Munsif acted illegally.

S. 108, Civil Procedure Code, does not lay down that if an application by one of several defendants is granted, the *whole* decree must be set aside in favour of *all* the defendants—*Gopala* v. *Subbier*.[2] The extent to which the decree must be set aside will depend upon the circumstances of each particular case. On what principle then is the Court to act in deciding how far any particular decree is to be set aside? There can, I think, be no doubt that the object of the section is that a more successful applicant should be put in exactly the same position as if no decree had been passed in the suit, and the decree, therefore, must be set aside so far as is necessary to achieve this object and no further. In the present case the 3rd defendant

1. (1904) I. L. R. 28 M. 122
2. (1903) I. L. R. 26 M. 604.
3. (1902) I. L. R. 24 A. 383 (F. B.)
4. (1871) 15 W. R 371.
5. (1867) 7 W. R. 237.
6. (1893) I. L. R. 18 B. 142.

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Munro J.

was entitled to plead in the suit that neither himself personally nor the Devaswom property was liable for the petitioner's claim. Therefore, on the principle above enunciated, he was entitled to have the *ex parte* decree set aside so far, and so far only, as it ordered payment by himself personally and from the Devaswom property. With the personal decree against the 1st and 2nd defendants, there was no need to interfere. The personal decree against the 1st and 2nd defendants is, therefore, restored, and the District Munsif's order is modified accordingly. There will be no order as to costs.

Abdur Rahim J :—The petitioner sued to recover from three defendants, personally and as managers of a Devaswom property, Rs. 27-6-0, being the amount of revenue paid by the plaintiff for the defendants with interest, and, the defendants not appearing, a decree was passed *ex parte* in the terms of the prayer in the plaint. Subsequently, the 3rd defendant made a successful application under S. 108, Civil Procedure Code, and the District Munsif thereupon set aside the entire decree as against all the defendants. The petitioner contends that he was not authorised to do so at least as against the 1st and the 2nd defendants, and that is the objection pressed before us.

As I read S. 108, Civil Procedure Code, it *prima facie* means that the decree, so far as it gives any relief to the plaintiff against the defendant who is able to establish that he was prevented from sufficient cause from appearing at the time of hearing, is to be set aside, and not against those defendants in the suit who have no good cause to make for non-appearance or have not chosen to take any action. But it may happen that the decree, from its nature, must, if set aside, necessarily exempt all the defendants from liability as is the case here with respect to so much of the decree as directs the amount in question to be paid out of the Devaswom property. In such cases the scope of S. 108, Civil Procedure Code, as I understand it, is no doubt enlarged, but that is because it cannot be helped: but if one were to go further and to hold that in all cases where there is one cause of action against all the defendants, or where there is a common defence, the Court acting under this section has the power to set aside the decree so far as it affects the defendants other than the applicant, it would, in my opinion, be putting too great a strain on the language of the Legislature. I may refer to S. 544, Civil

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Abdur Rahim J.

Procedure Code, where in the case of an appeal the Legislature found it necessary to expressly empower one of several plaintiffs or defendants in a suit in which the decree proceeds on a ground common to all the plaintiffs or all the defendants to appeal against the whole decree and to authorize the Court to reverse the whole decree, if it thinks fit, as furnishing a strong though indirect corroboration of the view I have suggested. The decisions of the different High Courts on the point are not in accordance with one another. The view I have mentioned is in agreement with that of the Bombay High Court in *Manek Kom Pedru* v. *Sitaram Atmaram Kagh* [1] and of *W. S. Seton-Karr* and *Dwarka Nath Mitter* JJ. in *Hurs Krishna Doss* v. *Motee Chand Babu.*[2] The language of S. 119 of Act VIII of 1859 which the learned Judges in the last case had to construe was substantially the same as that of S. 108 of the present Code. More recently, however, in *Mahammad Hamidulla* v. *Tohurennisa Bibi*[3] the judgment of *Maclean* C. J. would, at first sight, seem to imply that in all cases under S. 108 a decree must necessarily be set aside as against all the defendants, but *Banerji* J. seemed inclined to limit this to cases in which the decree is one and indivisible, or is based upon a ground applicable to the case of all the defendants. In *Monomohini Chowdhurani* v. *Nara Narain Roy Chowdhri*,[4] however, *Maclean* C. J. points out that he did not intend to lay down in *Mahomed Hamidulla* v. *Tohurennissa Bibi*[3] any proposition wider than that enunciated by *Banerji* J. In *Bhura Mal* v. *Har Kishen Das*[5] the majority of the Full Bench (*Stanley* C. J. and *Burkitt* J.) adopted the view of the Calcutta High Court, but *Aikman* J., while agreeing with the judgment of the Court in that particular case, gives strong reasons for the more limited construction of the section. In this High Court, in *Gopala* v. *Subbier*[6] the learned judges held that where the claim of the plaintiff, as in the case with which they had to deal, did not rest on a basis common to all defendants, the Court cannot, on application by one of them, set aside the decree as against the other defendants as well, but they expressed a doubt as to whether the result might not be different if the decree was based on a common ground.

1. (1898) I. L. R. 18 B. 142.
2. (1867) 8 W. R. C. R. 260.
3. (1897) I. L. R. 25 C. 155.
4. (1899) 4 C. W. N. 456.
5. (1902) I. L. R. 24 A. 383.
6. (1903) I. L. R. 26 M. 604.

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Abdur Rahim J.

Holding, as I do for the reasons which I have briefly set forth, that the decree as against the defendants other than the one who has shown sufficient cause within the meaning of S. 108, Civil Procedure Code, cannot be set aside except so far as it is one and indivisible, I am of opinion that the Munsif had no power to set aside the decree obtained against the defendants 1 and 2, respectively, but that he was right in setting aside so much of the decree as made the Devaswom liable for the money. I, therefore, agree that the order of the Munsif should be modified as indicated.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Wallis and Mr. Justice Munro.

R. M. P. L. Palaniappa Chettiar and another .. Appellants* (*Plaintiffs: Decree-holders*).

v.

Raja Visvanatha Vijaya Kumara Bangaru Tirumalai Savari Naidoo & another.. Respondents (*Defendants 2 & 3; Judgment-debtors*).

Palaniappa Chettiar v. Savari Naidoo.

C. P. C, Ss 230, 257-A—Order sanctioning a compromise not a new decree or order directing payment of money—C. P. C., S 13—'Res judicata' on question of law—Erroneous decision on a point of law.

An order sanctioning a compromise under S. 257-A, C. P. C, is neither a new decree nor an order for the payment of money within the meaning of S. 230, C. P. C.

A decision come to on a mistake of law cannot operate as *res judicata* in subsequent proceedings not affecting the operation of the prior order.

[*Mangalathammal* v. *Narayanaswami Aiyar*[1]; *Aitamma* v. *Naraina Bhatta*[2] followed.]

Appeal from the order of the Subordinate Judge's Court, Madura (East), passed in E. P. No. 127 of 1906 in O. S. No. 16 of 1892.

P. R. Sundara Aiyar and *K. Srinivasa Aiyangar* for appellants.

C. S Govindaraju Mudaliar and *S. Venkatachariar* for respondents.

The Court delivered the following

JUDGMENT:—The application is barred under S. 230 unless the order sanctioning the agreement under S. 257-*A* can be

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* A. A. O. No. 97 of 1906. 22nd April 1908.

1. (1907) I. L. R. 30 M. 461. 2. (1907) I. L. R. 30 M. 504.

said to be a new decree or an order subsequent to decree directing the payment of money within the meaning of S. 230 (*b*). In our opinion, the order sanctioning the compromise cannot be said to be either a new decree or an order for the payment of money within this section—see *Venkatagiri Iyer* v. *Sadagopachariar.*[1] It is then contended that it is *res judicata* between these parties, that the order amounts to a decree, because, on an objection taken under S. 311 to the confirmation of a sale in execution of the decree, it was held that the order operated as a decree and rendered notice under S. 245 unnecessary. This ruling, in our opinion, proceeded on a mistake of law, and such a mistake cannot operate as *res judicata* in a subsequent proceeding which in no way affects the operation of the previous order confirming the sale—*Mangalathammal* v. *Narayanaswami Aiyar*[2] and *Aitamma* v. *Narayana Bhatta.*[3]

We agree with the lower Court and dismiss this appeal with costs.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL.

[ON APPEAL FROM THE HIGH COURT AT CALCUTTA.]

Present:—Lord Robertson, Lord Atkinson, Lord Collins, Sir Andrew Scoble and Sir Arthur Wilson.

Mahomed Ali Haidar Khan and another, heirs and legal representatives of Mahomed Ali Amjad Khan .. Appellants* (*Plaintiffs*).

v.

The Secretary of State for India in Council and others .. Respondents (*Defendants*).

Mahomed Ali v. Secretary of State.

Assam Reg. III of 1891—Onus—Legislation to extinguish proprietary rights in land—Privy Council practice—Question of fact—Concurrent findings—Considerations of law in the process of reasoning—Possession for less than 60 years as proof of title.

Where Government claims to apply to certain lands a Regulation having the effect of confiscating proprietary rights, and giving compensation in exchange, it lies upon

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* June 18 and 19 and July 31, 1908.

1. (1900) 14 M. L. J. 369.
2. (1907) I. L. R. 30 M. 461.
3. (1907) I. L. R. 30 M. 504.

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the Government to show that the facts of the case are such as to bring it within the operation of the Regulation.

Their Lordships also held that they were entitled to go into a question of fact even though there be concurrent findings on it, if at every point in the process of the reasoning on the question, considerations of law have to be regarded.

In this case, though the evidence as to possession and enjoyment was insufficient to establish a title by adverse possession for sixty years, their Lordships relied upon it as proof of title, and, on the strength of that evidence, reversed the judgments of the Courts below.

Appeal from a judgment and decree of the High Court of at Calcutta affirming a judgment and decree of the Court of the Subordinate Judge of Sylhet.

The principal questions raised on the appeal were the nature and extent of the appellants' rights over the land in suit and the application thereto of Regulation III of 1891.

On May 16, 1891, the Sylhet Jhum Regulation (Regulation III of 1891) was passed. Material parts of the Regulation are set out in their Lordships' judgment. In the exercise of the power vested in him by the Regulation, the Commissioner of Assam, on July 25, 1891, notified in the *Assam Gazette* that the Regulation would be put into force in certain areas from the 1st October following. Among the tracts of land to which the notification related, was the area, which was the subject of the present litigation, and was known as Mouzah Puber Pahar, situated on the eastern border of Perugunnah Langla in the Sylhet District.

On April 13, 1897, Mahomed Ali Amjad Khan instituted the suit in the Court of the Subordinate Judge of Sylhet. The defendants were the Secretary of State for India in Council, and nineteen persons who, jointly with the plaintiff, held fractional shares in the villages described in Sch. V annexed to the plaint. The plaintiff alleged that he was the sole owner of certain villages described in Sch. IV attached to the plaint, and part owner of certain villages described in Sch. V; that the land described in Sch. II appertained to the taluqs mentioned in Sch. IV and, the land described in Sch. III to the taluqs mentioned in Sch. V of the plaint; and that he was still in possession of the lands. The entire tract in dispute was described in Sch. I to the plaint. The plaintiff claimed to be the sole owner of the land of Sch. II, and to be part owner of the land of Sch. III on the grounds that the lands in dspute (known as the Lands of Puber

Pahar or Eastern Hill) were part and parcel of the permanently settled lands described in Schs. IV and V attached to the plaint, not lands in which he and his co-sharers had merely the Jhum rights, and that by adverse possession for over 60 years he had acquired a title against the Government. The plaint also stated that under the permanent settlement, the settlement holders of those estates were given absolute proprietary right to the land described in Sch. I; and that the highest Revenue authorities had decided that those lands appertained to the permanently settled estates. The plaint further alleged that the Reg. III of 1891 was *ultra vires*, and that in any event it had no operation on the rights of the plaintiff, and prayed for, among other things, the following declarations :—

(*a*) That on a declaration that the land of Sch. I does not come with the purview of the Sylhet Jhum Regulation, a decree may be awarded confirming the plaintiffs' absolute proprietary right and the right created by possession over 60 years in respect of the whole of the land of Sch. II and of $19\frac{152827}{9338837}$ gundahs share of the land of Sch. III.

(*b*) That a decree may be awarded declaring that notification No. 2788 issued by the Chief Commissioner of Assam and published in the *Assam Gazette* of the 25th July 1891 had not affected and could not affect the plaintiffs' right and possession in respect of the disputed lands under the permanent settlement and by virtue of possession for over 60 years.

In his written statement, dated September 11, 1897, the Secretary of State for India in Council denied that the lands in suit were included in the taluqs or estates named by the plaintiff and that the plaintiff had acquired any title to the land by adverse possession. With reference to the other allegations made in the plaint, it was stated, in answer, that all that the highest Revenue authority admitted was that the plaintiff had Jhum rights attached to the lands in dispute, but it was contended that, even if it were admitted that the plaintiff and his co-sharers really had such Jhum rights, they had been extinguished by Reg. III of 1891.

The Subordinate Judge framed eight issues, of which the three following are material :—

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5th;—Whether the lands specified in Sch. II and III appertain to the taluqs mentioned in Sch. IV and V of the plaint respectively?

6th :—Whether the land in dispute does not lie within the limits of the permanently settled estate? And therefore whether it comes within the operation of the Jhum Regulations?

7th :—Whether the plaintiff has acquired any title to the disputed land by adverse possession? And whether the plaintiff is in possession of the same or not? And whether the plaintiff has the alleged share in the land specified in Sch. III of the plaint or not?

The documentary evidence relied upon by the plaintiff may be summarised as follows :—

The records of the decennial settlement afterwards made permanent were not forthcoming, but the Mauzawari papers for the year 1208 B. S. (1801-1802 A. D.) showed that the income derived from Puber Pahar was included in the collections of the villages described in Sch. IV and V of the plaint, and the Mauzawari papers for the years 1209 B. S. (1802-1803 A. D.) and 1236 B. S. (1829-1833 A. D,) contained the following remarks:—

" This quantity is estimated by sight only, but it may be less or more on inquiry being made in the Pergunnah. The dastur of Jhum cultivation is this :—Jhum is not cultivated in one place every year. When land is found anywhere within these boundaries Jhum cultivation is made thereon, and after measurement and assessment the mirasdars take the rest by apportionment according to their respective shares in the Jhum revenue at the time of the hastbud measurement. This hill is jummai."

The latter statements referred to Mouzah Puber Pahar, and purported to be statements "of Mahals chuckla Sylhet, except the abadi and jungle lands of taluqs, belonging to mirasdars according to the hastbud prepared by Mr. John Willes."

There was documentary evidence to show that from 1837 the plaintiff's predecessors in title received kabuliyats from persons carrying on Jhum cultivation on the lands in question.

About the year 1840 the Government granted a lease of certain lands, not settled at the time of the permanent settlement, to Ghun Singh Hazari and Gobind Singh Hazari. The lands leased were in the neighbouring pergunnah Patharia. The lessees made an attempt to realise rents from tenants cultivating in Puber Pahar. Gour Ali Khan, the predecessor in title of the plaintiff, made objections, which were, on December 14, 1842, decided in his favour by the Munsif of Hingajia, who held that "it was satisfactorily proved that the Jhum lands, on account of the disputed rents as stated by the plaintiffs, belong to the jammai taluqs possessed by the mirasdars of Langla Pergunnah" That finding was affirmed on appeal by the District Judge of Sylhet by judgment dated May 20, 1843.

After inquiry an order was made on September 18, 1848, excluding Mouzah Puber Pahar as lands permanently settled from the area of land claimed by the Government, as land in regard to which a settlement was still to be made.

Later on further measurements were made of the Government lands, and in the maps prepared a large area of Puber Pahar was included. On objection the Revenue Commissioner of Dacca ordered the exclusion from the map of the area claimed as part of the estate of the plaintiff.

On September 14, 1855, the Board of Revenue again affirmed the title of the plaintiff, and directed a refund of all moneys wrongly collected by the Government.

In the year 1860, some portion of Puber Pahar was again included in maps prepared of Government lands, and was released by an order dated February 28, 1861.

Since then the plaintiff remained in undisputed and undisturbed possession of Puber Pahar.

On April 15, 1899, the Subordinate Judge delivered his judgment. He decided that the plaintiff failed to show that the disputed land was included in the permanently settled estates, and it necessarily followed that it did not appertain to the taluqs, or estates, mentioned in Schs. IV and V of the plaint; and that the land in dispute was beyond the limits of the permanently settled estates, and therefore that land came within the operation of Reg. III of 1891. On the question of possession he was of opinion

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that the leases and accounts filed by the plaintiff were genuine. The earliest lease was dated December 28, 1837, and he considered that possession for 60 years was, therefore, not proved. He was also of opinion that the nature of the acts of possession indicated a casual interest and not an absolute interest in the land which could by prescription mature into ownership. In consequence of those findings he made a decree dimissing the plaintiff's suit with costs.

The plaintiff Mahomed Ali Amjad Khan died *pendente lite* and on his death his heirs and legal representatives Mahomed Ali Hailar Khan and Mahomed Ali Asgar Khan, minors, through their next friend L. W. LYDIARD, Manager under the Court of Wards, were brought on record.

Against the decree of the Subordinate Judge the appellants appealed to the High Court of Judicature at Fort William in Bengal, which Court delivered its judgment on March 29, 1904, and agreed with the Subordinate Judge that the appellants failed to prove that the lands in suit lay within the boundaries of his permanently settled taluqs. The Court, therefore, decided that the appellants did not prove that a permanent settlement of the lands in dispute had been made with their predecessors in title, and that the rights exercised by them over those lands were not exercised in such a manner as to confer a title by adverse possession. In the result a decree was made dismissing the appeal with costs.

Against the decree of the High Court the appellants appealed to His Majesty in Council. Of the respondents only the Secretary of State for India in Council appeared.

Sir Robert Finlay K. C., and *De Gruyther*, K. C., for the appellants, referred to the Assam Code (Ed. 1897) the Sylhet Jhum Regulation, 1891 (Reg. III); Reg. I of 1793, S. 10; Reg. VIII of 1793, Ss. 23—25; The Fifth Report from the Select Committee on the affairs or the East India Company, Vol. I, Bengal Presidency, (Madras Edition, 1883), pp. 14, 18, 21, 22, 23 (top of), 130, 139, 146 (recommendation), 147, 150, 568 (third resolution), 569, 571 (fifth resolution), 580, 585, 592, 609, 611, 613, 616, 626 and 630; The Assam Land Revenue Manual, by E. A. GAIT, Calcutta Edition, 1896), pp. CXXV (refers to the

permanent settlement in Sylhet), C XXVIII (refers to the settlement of the Sylhet District carried out by Mr. WILLES), C XXIX, CXXXII, CXXXIV, 132 and 137; and Directions for Revenue Officers in the North-Western Provinces of the Bengal Presidency (Calcutta Edition, 1850). The officers of Government, who made settlements, were allowed to take into account only assets arising out of the estate. They could not lawfully take into account any asset that did not arise out of the estate. The evidence clearly shows that profits of the lands in suit were taken into account in settling the appellants' taluqs. It must be presumed that in this case the officers of Government duly followed the course laid down by law and included the profits of the lands in suit in estimating the assets of the appellants' taluqs because the land formed part of the appellants' estate. The land in suit is, therefore, beyond the scope of Reg. III of 1891. It is for the Government to show that the lands in suit are 'beyond the limits' of the appellants' estate, and unless the Government succeeds in showing that the lands are so situated, the appellants are entitled to succeed. Whether the lands in dispute are within or 'beyond' the limits of the appellants' estates is not merely a question of fact. In the consideration of that question, as already shown, considerations of law are involved.

The Mauzawari papers for 1802-1803 and 1829-1830 show that the lands in dispute were included in the appellants' estates as mirasdar, *i.e.* proprietor, and was assessed to revenue as such. From the date of the settlement the appellants and their predecessors in title have held continuous possession of the lands, received rents realised therefrom and paid revenue originally assessed thereon. The word Jhum means a hill or forest village. The cultivation in such a village would naturally be shifting. There is nothing in the word itself, or its use, to indicate that a hill or forest village cannot form a portion of Zemindar's estate to which his title was recognised at the permanent settlement. After a review of the whole of the evidence it was submitted that the evidence on record proved the title of the appellants and that the decree of the High Court should be reversed. For the meaning of the word 'mahal' reference was made to the Regulations of the Bengal Code, by C. D. Field, (Calcutta Edition, 1875), Introduction, p. 25.

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Cohen, K. C., and *Ross*, for the respondent, the Secretary of State for India in Council:—Reg. III of 1891 is passed under the authority of 33 Vict. C. 3, and is not *ultra vires*. A reference to the Preamble of Reg. III of 1891 and the *Assam District Gazetteer, Vol. 2. Sylhet, pp.* 212 *et seq.* shows that the contention that there is a strong presumption in this case that the lands in suit formed part of the appellants' taluqs because the officers of Government, who made the assessments, were not allowed by law to take into account the profits of any land that did not form part of the estates settled, is untenable. It is clear from these authorities that the officers making permanent settlement in the District of Sylhet did include among the assets of the estates settled 'the income then derived by the proprietors of those estates from shifting cultivation carried on by them *beyond the* limits of those estates.' The lands in dispute are beyond the limits of the appellants' taluqs. It is for the appellants to show that those lands are within the limits of their taluqs. Both Courts in India have laid the burden of proof on the appellants and come to the concurrent finding that the appellants have failed in proving that the lands in suit were within the limits of their permanently settled estates.

(*Lord Collins* :—Concurrent findings seem to be conjectures, not findings).

Cohen :—The question whether the lands are within or beyond the limits of the appellants' settled estates is treated in both Courts in India as a question of fact. The first time it was contended that it was a question of law is when the appellants presented their petition to the High Court for leave to appeal to His Majesty in Council. It is now too late to allow the appellants to raise that contention and it is submitted that such a contention is not open to them. There are also concurrent findings of the Courts in India, that the appellants failed to prove as contended in their plaint, their title to the lands in suit by adverse possession of 60 years. It is submitted that the documentary evidence on record, taken as a whole, clearly shows that the officers who effected the permanent settlements of the appellants' taluqs, included, for the purposes of assessment among the assets of those taluqs, under the name of Jhum, the income then derived by the proprietors of those taluqs from shifting

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cultivation, carried on by the proprietors or their dependents beyond the limits of those taluqs; and further, that the areas of such cultivation were altogether undefined, and varied in different years. The lands so undefined could not be, and were not, included in the settled areas; and it is further submitted that this state of things is exactly what the Legislature contemplated when Reg. III of 1891 was passed. The decrees of the lower Courts are right and ought to be confirmed.

For the meaning of the word 'mahal' reference was made to the Glossary of Indian Terms by Wilson.

De Gruyther replied.

The judgment of their Lordships was delivered by

Sir Arthur Wilson:—This is an appeal against a judgment and decree of the High Court of Calcutta, dated the 29th March, 1904, which affirmed the judgment and decree of the Subordinate Judge of Sylhet dated the 15th April, 1899.

The question raised upon the appeal is whether Reg. III of 1891 issued under the authority of the Act, 33 Vict., C. 3, can properly be applied in the case of certain lands known by the name of Puber Pahar.

The Regulation in question begins with a most useful preamble, which recites as follows:—

"Whereas the officers who effected the permanent settlement of certain estates in the district of Sylhet included, for the purposes of assessment, among the assets of these estates, under the designation of *Jhum* * * * the income then derived by the proprietors of these estates from shifting cultivation carried on by them or their dependents beyond the limits of those estates, and from tolls levied by them on forest-produce cut, gathered or enjoyed in places beyond the limits of those estates * * *;

"And whereas, in as much as the said cultivation and the operations of those who cut, gathered or enjoyed the said forest-produce shifted from year to year over immense and altogether undefined areas, the tracts of land over which they extended were not specified at the time of settlement, and in consequence of this, rights of various, and in some cases vague, descriptions are from time to time asserted by the said proprietors over immense and undefined areas;

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"And whereas it is thus impossible for any person to obtain a safe and clear title to land in those areas, and the extension of cultivation is, in consequence, impeded;

"And whereas it is expedient that the rights, if any, corresponding to the said *Jhum* * * * assets should be commuted."

Section 2 enacts that:—

"All rights * * * in respect of which *Jhum* * * * assets were assessed in any permanent settlement of land, or which have been at any time acquired by virtue of, or under cover of, such assessment shall be deemed to have been extinguished."

And S. 3 declares that: All proprietors of such estates shall be entitled to compensation. The nature of *Jhum* cultivation is explained in an earlier official document relating to the hill lands in question:—

"The dastur of *Jhum* cultivation is this: *Jhum* is not cultivated in one place every year. When land is found anywhere within the boundaries *Jhum* cultivation is made thereon, and after measurement and assessment the Mirasdars take the rent by apportionment according to their respective shares in the *Jhum* revenue at the time of the hastbud measurement."

And that description seems to be correct to the present day.

After the passing of the Regulation the Government of Assam, whose jurisdiction included Sylhet, issued and published orders in due course, extending the Regulation to the areas in question with others.

The question, therefore, raised in the case and discussed on this appeal is whether the Regulation can be put in force with reference to the lands to which it is sought to apply it. Those lands have undoubtedly been long in the enjoyment (such enjoyment as is practically possible under the circumstances of the case) of the appellants' predecessor in title. The Government claims to apply to these lands a Regulation which would have the effect of confiscating proprietary rights, and giving compensations in exchange. Under these conditions their Lordships think it clear that it lies upon the Government to show that the facts of the case are such as to bring it within the operation of the Regulation—in other words, that the present case is one in which, at the Permanent settlement, in making settlement of certain taluqs with

the appellants' predecessors in title, the officers of Government included, for the purposes of assessment, among the assets of those taluqs the income derived by their owners from *Jhum* cultivation carried on beyond the limits of the settled estate.

That the taluqs now held by the appellants were settled at the Permanent Settlement is beyond dispute, and that in estimating the assets of those taluqs the profits of the present *Jhum* lands were then brought into account is also beyond dispute. But according to the appellants those profits were taken into account because the *Jhum* lands formed part of the settled estate; while, according to the other side, the *Jhum* land profits were taken into account as assets accruing to the owners of the settled estate, but derived from lands lying outside it. The question is, which of these views is to be accepted.

It was contended on behalf of the Secretary of State that the question whether the *Jhum* lands lay within or without the limits of the settled estate was a question of fact, and that their Lordships should accept the concurrent findings of the two Courts in India. This contention their Lordships are unable to accept. In a sense the question is one of fact; but at every point in the process of reasoning considerations of law have to be regarded.

It was contended on the other side that, under the Regulations in force at the time of the Permanent Settlement no assets, could lawfully be taken into account in setting the Jhum of an estate, except those arising out of the estate itself; and that this consideration established a very strong presumption that in any individual case the course in accordance with law had been followed. But this contention was met, and in their Lordship's opinion effectively met, by a reference to the preamble of the Regulation under consideration. That preamble shows that the course said to have been impossible was in fact followed, rightly or wrongly, and followed in a number of cases sufficient to render legislation desirable. It remains, however, to consider, in each case that comes before the Courts, whether the facts bring the case within the operation of the Regulation.

The taluqs in which the lands in question are said to have been included were, no doubt, settled at the decennial settlement, and that settlement was in due course made permanent. But as

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might be expected after so great a lapse of time, little now survives of the original official papers, and what does survive is not very easy to construe.

The most important of the early documents are certain mauzawari papers from 1801-1802 onwards. These shew clearly that in assessing the taluks, the Jhum assets were taken into account. But this, as has been shown, is a neutral fact consistent with the case of either party. Beyond this it is difficult to carry the effect of those papers.

Those papers were examined in detail by counsel upon both sides on the argument of appeal. It appears to their Lordships unnecessary to repeat that examination. It is enough to say that there are circumstances favorable to one side and circumstances favorable to the other, but that no confident conclusion could be drawn from these papers either one way or the other.

Reliance was also placed upon certain thakbast maps, but these are equally inconclusive.

The only other matter which remains to be considered is the evidence as to possession and enjoyment of the lands in question on the part of the plaintiff and those who preceded him. In the Courts in India the plaintiff sought to establish a title by adverse possession for sixty years. In this he was held to have failed, and, on the argument of the appeal, no such case was contended for, but the evidence of possession and enjoyment was relied upon as proof of title.

Regarded in this light, that evidence is important, and it all points one way. It was shown that from as early as 1837 the appellant's predecessors in title received kabuliyats from persons carrying on *Jhum* cultivation on the lands in question.

In 1842 and 1843 those predecessors in title succeeded in defeating an attempt to exercise rights over these lands on the part of the persons interested in an adjoining mouja.

On several occasions in subsequent years the appellant's predecessors successfully resisted proposals on the part of Revenue officers of Government to settle portions of those hill lands as *ilam* lands open for settlement. The most important instance was one that terminated in an order passed by the Board of Revenue (the highest Revenue authority in the Province) dated the 14th

September 1855: It had been proposed to offer for settlement a portion of the lands now in suit as ilam lands. This was objected to by the appellant's predecessors. The Collector over-ruled the objection, but the Board of Revenue concurring with the Commissioner, reversed that finding, on the ground, as their Lordships understand it, that the lands were included in the Permanent Settlement. After that the possession and enjoyment of the appellants and those through whom they claim seem to have been continuous. Mahomed Ali v. Secretary of State.

Their Lordships will humbly advise His Majesty that the appeal should be allowed, that the decrees of the Courts in India should be set aside with costs, and a decree made granting the appellants the declaration asked for by the plaint. The respondent (the Secretary of State) will pay the costs of this appeal.

Solicitors for appellants:—*Messrs T. L. Wilson & Co.*

Solicitor for the respondent (the Secretary of State for India in Council)—*Solicitor, India Office.*

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

Rudra Gowd and others .. *Accused* in Cal. Case No. 165 of 1908 on the file of the Stationary Sub-Magistrate of Hospet.*

Cr. P. C., S. 259—Jurisdiction of Magistrate to re-entertain complaint on the same facts after a discharge.

A Magistrate who has discharged an accused person under S. 259, Cr P. C, is competent to re-entertain a fresh complaint on the same facts.

[*Chinnathambi* v. *Salla Guruswami Chetty*[1] and *Emperor* v. *Chinna Kaliappa Gounden*[2] followed.]

In re Rudra Gowd.

Case referred for the orders of the High Court under S. 438 of the Criminal Procedure Code by the Sessions Judge of Bellary.

The *Public Prosecutor* for the Crown.

The Accused was *unrepresented.*

The Court made the following

ORDER:—The question referred to us is whether a Magistrate who has discharged an accused person under S. 259, C.,

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* Cr. Rev. C. 239 of 1908 30th July 1908.
Case Ref. No. 49 of 1908.

1. (1904) I. L. R. 28 M. 310
2. (1905) I. L. R. ... 26.

In re Rudra Gowd.

can re-entertain a fresh complaint on the same facts. The accused are not represented.

In *Chinnathambi* v. *Salla Gurusawmi Chetty*[1] it was held by Sir *Arnold White*, C. J., sitting as a single Judge, that a Magistrate has such a power. In *Emperor* v. *Chinna Kaliappa Gounden*[2] the question for decision was whether it was competent to a Magistrate after dismissing a complaint under S 203 to re-hear the complaint when such order of dismissal has not been set aside by a higher Court. The decision of the majority of the Full Bench was that a Magistrate had power to re-hear the complaint. It was further observed by Sir *Arnold White*, C. J , that as regards the point which had been under consideration no distinction could be drawn between an order under S. 203, Cr. P. C., and an order under S. 253 or 259, Cr. P. C. With this observation we agree. We, therefore, answer the question referred to us in the affirmative.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Sankaran Nair.

K. T. Ellusah ... Appellant.*

v.

Ruppu Rangayyan and another .. Respondents.

Ellusah v. Rangayyan.

C. P. C., S. 295—"Against the same judgment-debtor"—Application for rateable distribution by attaching creditor of decree-holder.

An application for rateable distribution by an attaching creditor of the judgment-creditor in a suit does not fall within S. 295, C. P. C.

On appeal from the orders of the Hon'ble Mr. Justice Boddam in Ordinary Original Civil Jurisdiction of this Court in C. S. No. 52 of 1904.

G. Krishnasawmi Aiyar for appellant.

P. M. Sivagnana Mudaliar for respondents.

The Court delivered the following

JUDGMENT :—As regards the appeal against the order of [Ma]y 16th, the appellant, the party who asked for an order for [rate]able distribution under S. 295 of the Civil Procedure Code,

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*O. S. A. No. 38 of 1907. 17th August 1908.

1. (1904) I. L. R. 28 M. 310.

2. (1905) I. L. R. 29 M. 126.

Ellusah v. Rangayyan.

was an attaching creditor not of the judgment-debtor in the suit in which the application for rateable distribution was made (O. S. No. 52 of 1904) but of the judgment-creditor in that suit. This being so, it is not a case where "the Court holds assets for execution of decrees for money against the same judgment-debtor" within the meaning of the section. The application under S. 295 was, therefore, rightly dismissed by the order of the 16th July. The appeal is dismissed with costs.

As regards the appeal against the order of August 13th—an order for the payment out of the whole of the money in court in O. S. No. 52 of 1904 to another attaching creditor (Ruppu Rangayyan)—the application on which the order appealed against was made was resisted on the ground that the appellant was entitled to rateable distribution. As we have pointed out in our judgment in the other appeal, he is not so entitled.

We decline to consider the point taken in appeal that the appellant was entitled to payment as a prior attaching creditor, since it seems clear that this was not the ground on which he resisted the application in the lower Court.

The appeal is dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Subrahmanya Aiyar and Mr. Justice Wallis.

Darapu Reddi Subramaniem and others .. Appellants* (*Defts. 2 and 3 and 1st Defts.' representative*).

v.

Suri Venkatasubbaraya Sastri .. Respondent (*Plaintiff*).

Subramaniem v. Venkatasubbaraya.

Madras Acts—Rent Recovery Act—Patta—Supply of water at tenant's request—Share in produce to landlord—Water rate—Proportionate liability—Maxim "Qui commodum sentit sentire debet et onus."

Where water was supplied at the request of the tenant and the landlord has been allowed half the produce raised with the water : *Held* that the tenant can be held liable only for half the water rate.

Second appeal from the decree of the District Court of Kristna at Masulipatam in A. S. No. 6 of 1904 presented against

* S. A. No. 1247 of 1905. 5th October 190[illegible]

Subramaniem v. Venkata-subbaraya Sastri.

the decision of the Court of the Deputy Collector of Masulipatam Division in S. S. No. 318 of 1903.

V. Ramesam for appellants.

K. S. Ramaswami Sastri for respondent.

The Court delivered the following

JUDGMENT:—This is a suit to enforce acceptance of a puttah, and the only question raised before us in second appeal is as to the liability to pay water rate to Government under Act VIII of 1865. The water was supplied at the request of the tenant, but the landlord has been allowed a share of the wet crop for the fusli in question. Under these circumstances, although the water was supplied at the request of the tenant, yet, as the landlord has been allowed half of the produce raised with the water, we think he ought to bear his proportion of the water rate on the principle of ***qui commodum sentit sentire debet et onus***, or in other words, that the benefit and the burden should go together.

We, therefore, allow the appeal, and direct that the patta shall provide that the tenant shall be liable for half the water rate, the landlord being liable for the other half. The appeal is allowed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

Radhakrishnier and others. .. Appellants *
(*Plaintiffs*).

v.

Muthusami Sholagan and others .. Respondents
(*Defendants*).

Radha-krishnier v. Muthusami Sholagan.

Mortgage decree—Decree for sale subject to a prior usufructuary mortgage held by plaintiff himself—Propriety.

There is nothing to prevent a Court from granting a person a decree for sale on a second mortgage of his, subject to a prior usufructuary mortgage on the same property held by himself.

Second appeal from the decree of the District Court of Tanjore in A. S. No. 962 of 1904 against the decree of the Court of the Subordinate Judge of Tanjore in O. S. No. 23 of 1904.

The Advocate General (P. S. Sivaswami Aiyar) for appellants.

The respondents were *not represented*.

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* S. A. No. 1039 of 1905. 7th September, 1908.

The Court delivered the following

Radhakrishnier v. Muthusami Sholagan.

JUDGMENT:—Certain property was usufructuarily mortgaged to the plaintiffs in 1890. The plaintiffs subsequently got two other mortgages on the same property. They brought the present suit on the two subsequent mortgages and asked for sale subject to their prior usufructuary mortgage. Both the Courts below held that the suit was not maintainable. That in a case like the present the plaintiff could have a decree for sale on the subsequent mortgages free of the prior mortgage is clear from *Rengasami Nadan* v. *Subbaroya Iyen.*[1] The plaintiffs are willing to accept such a decree if the decree they asked for cannot be granted. But we see no good reason why there should not be a decree for sale subject to the prior mortgage, and there is direct authority for granting such a decree in *Ram Shankar Lal* v. *Ganesh Prasad.*[2]

We, therefore, reverse the decree of the District Judge and remand the appeal for disposal on the merits. Costs will abide the result.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Sir Charles Arnold White, *Kt.*, Chief Justice, and Mr. Justice Sankaran Nair.

K. Mangiah Chetty .. Appellant *

v.

K. Ramiah Chetty and another .. Respondents.

Mangiah Chetty v. Ramiah Chetty.

Vakil's right of audience—Insolvency appeals in the High Court.

A vakil has the right of audience b[illegible]te Bench of the High Court in appeals from the Insolvency Court.

On appeal from the order o[illegible]ship Mr. Justice Boddam, Commissioner in Insolvency, in [illegible] No. 133 of 1897 on the file of the Court of the Relief of Insolvent Debtors at Madras in the matter of Kanchi Ramiah, an insolvent.

Sir V. Bhashyam Aiyangar for the Vakils Association.

K. Ramaswami Aiyar, Attorney, in person.

The Court delivered the following

JUDGMENT :—A preliminary objection has been taken that a vakil has no right of audience in appeal from an order made by the Insolvency Court.

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* O. S. A. No. 12 of 1907. 25th August 1908.

1. (1907) I. L. R. 30 M. 408.
2. (1907) I. L. R. 29 A. 385.

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Mangiah Chetty v. Rangiah Chetty.

This point was raised in 1889 in O. S. appeal 10 of 1888, and it was there held that a vakil had the right of audience before this Court in an appeal from the Insolvency Court.

We agree with this decision. There is nothing in the Insolvency Rules, 1905, which has the effect of taking away this right. The preliminary objection is overruled.

It seems to us that documentary evidence of considerable importance was not considered by the learned Judge, and that the inquiry cannot be said to have been complete. We accordingly set aside the order of the learned Judge and send the case back to the Insolvency Court in order that the application may be dealt with by the Commissioner in Insolvency. Costs incurred up to date will be dealt with by the Commissioner in Insolvency.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Miller and Mr. Justice Sankaran Nair.

Signor Coppa D'Angelis .. Petitioner* (*Plaintiff*).

v.

Signor G. D'Angelis .. Respondent (*Defendant*).

Coppa D Angelis v. G. D'Angelis.

C. P. C., S. 622—Revision—Practice.

The High Court will not, unless it be in a very special case, interfere under S. 622, C. P. C., when the party aggrieved has a remedy elsewhere.

Petition under S. 622 of the Civil Procedure Code and under S. 15 of the Charter Act praying the High Court to revise the judgment of the Acting Chief Judge of the Court of Small Causes at Madras.

Orr, David and Brightwell for petitioner.

Grant and Greatorex for respondent.

The Court delivered the following

JUDGMENT :—An objection is taken now that we ought not to hear this petition under S. 622 of the Civil Procedure Code because it was open to the petitioner before coming here to seek a remedy under S. 38 of the Small Cause Court Act. It is not denied that that remedy was open to him, and we think the objection must prevail. This Court will not, unless it be in a very special case, interfere under S. 622 when the party aggrieved has a

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* C. R. P. 81 of 1908. 24th September, 1908.

remedy elsewhere, and no special reason is shewn here why the application provided by S. 38 of the Small Cause Court Act could not have been made. We, therefore, dismiss this petition. The objection should have been taken at an earlier stage of the proceedings, and we direct that each party bear his own costs. Coppa D'Angelis v. D'Angelis.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Abdur Rahim.

Rajai Thimmanayanim Bahadur Varu .. Appellant*
v. (*2nd Plaintiff in both*).
P. Rama Rayanim Garu .. Respondent
(*Defendant in both*).

Madras Acts—Rent Recovery Act, S. 11—Propriety of puttah—Improper stipulation—Term restraining tenant from cutting trees—Fruit bearing and other trees. Thimmanayanim v. Rama Rayanim.

A puttah containing a term restraining the tenant from cutting fruit-bearing trees is a proper puttah. A term restraining the tenant from cutting trees other than fruit-bearing trees is improper.

Second appeals from the decrees of the District Court of North Arcot in A. S. Nos. 232 and 233 of 1905 presented against the decision of the Head Assistant Collector of North Arcot in S. S. Nos. 1092 of 1904 and 266 of 1905 respectively.

L. A. Govindaraghava Aiyar and *A. Ramachandra, Aiyar* for appellant, relied upon *Bodda Goddeppa* v. *Maharajah of Vizianagaram*[1] distinguishing *Kakarla Abbaya* v. *Raja Venkatapapaya*[2] and Ss. 3 and 12, Estates Land Act.

C. R. Tiruvenkatachariar, for respondent, relied upon *Kakarla Abbaya* v. *Raja Venkatapapaya*[2] and *Narayana Aiyangar* v. *Orr*[3] and also Ss. 3 and 12 on Estates Land Act.

The Court delivered the following

JUDGMENT:—We cannot interfere with the decision of the lower Court as to the rate of rent payable by the defendant.

On the other question raised, the Judge's decision is opposed to the recent decision of this Court in *Bodda Goddeppa* v. *Maharajah of Vizianagaram*[1] in which it was held that the landlord is entitled to restrain the tenant from cutting down fruit-bearing

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* S. A. Nos. 1012 and 1013 of 1907. 6th August 1908.

1. (1906) I. L. R. 30 M. 155. 2. (1905) I. L. R. 29 M. 2[illegible]

3. (1902) I. L. R. 26 M. 252.

trees. The contention of the plaintiff that the tenant is not entitled to cut down other trees also on his holding cannot be accepted. The puttah must be amended; and the decree of the lower appellate Court will be modified accordingly. No costs will be allowed.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Pinhey.

Krishnaswamier .. Petitioner*
(5th Counter-Petitioner 5th Defendant).

v.

Swaminadhier and others .. .. Respondents
(Peter. & 1 to 4, & 6 Ctr. Peters.—Plff. 1 to 4 & 6 Defts.

Krishnaswamier v. Swaminadhier

C. P. C, Ss 287, 311, 622.—Order, construction of—Determination of section under which it is passed—Order passed without jurisdiction—Revision—Conversion of appeal into revision—Jurisdiction of successor in office to modify predecessor's order—Mortgage decree, form of—Sale by an undivided sharer bad.

The fact that a Court by an order purporting to be passed under one section does some thing which it is not empowered by the section to do, will not make it an order under some other section. An order purporting to be passed under S. 287, C. P. C., but without jurisdiction, cannot, on that ground, be deemed to have been passed under some other section and consequently appealable.

A judicial order not warranted by the section is open to revision by the High Court under S. 622, C. P. C.

A mortgagee is not entitled to divide his security into undivided shares and say that he will sell one third of it for the whole debt, and if that is not enough, another third, and so on, though it is open to the Court to sell a specific portion of the property first, and then to proceed to sell the other portions.

A Court has no jurisdiction to modify an order passed by the predecessor in office of the presiding judge.

Petition under S. 622 of the Civil Procedure Code praying the High Court to revise the order of the Subordinate Judge of Kumbakhonam in (E. P. No. 2) E. P. R. No. 190 of 1907 in O. S. No. 84 of 1905.

V. Krishnasamy Aiyar and *T. R. Venkatrama Sastri* for petitioner.

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* C. R. P. 592 of 1908. 2nd September 1908.
Originally filed as A. A. O 126 of 1908.

Krishnaswamier v. Swaminadhier.

T. Rangaramanuja Chariar, B. Govindan Nambiar, G. S. Ramachandra Aiyar and T. Gopala Desikachariar for respondents.

The Court delivered the following

JUDGMENT:—A preliminary objection is raised on *Sivagami Achi* v. *Subramania Iyer*[1] on the ground that the order under consideration is an order made under S. 287 of the Civil Procedure Code. The order purports to be under that section, and it is difficult to say that the fact that the Subordinate Judge, by his order, does something which he is not empowered by the section to do, will make it an order under some other section, and so appealable. But though the order is not appealable, or rather because it is not appealable, we can treat the appeal as an application for revision under S. 622 of the C. P. C. in a proper case—and we think this a proper case.

The Subordinate Judge has expressly departed from his predecessor's order made under S. 89 of the Transfer of Property Act. By that order all the property was to be sold, and the question of lots into which it was to be divided and the order in which they were to be sold was reserved for consideration when the proclamation should be settled. But this order the Subordinate Judge considers he may treat as a mere *obiter dictum*, unnecessary for the making of an order for sale under S. 89. We do not agree.

The order of the Subordinate Judge directs that the 1st defendant's undivided share be first sold, and then, if necessary, the shares of defendants Nos. 2 & 3. We may observe that all their shares have passed into the hands of the appellant by purchase in execution of another decree.

The decision in *Sivagami Achi* v. *Subramania Iyer*[1] proceeds on the ground that the powers exercised under S. 287 of the Civil Procedure Code are ministerial and not judicial, and the Subordinate Judge having made an order modifying his predecessor's order, which he had no power to make, has acted with material irregularity in the exercise of his jurisdiction. He has done more than direct the order in which the property is to be sold: he has directed the order in which the shares of the judgment-debtors are to be sold, and so has perhaps altered the respective liabilities imposed on the judgment-debtors by the decree.

1. (1903) I. L. R. 27 M. 259.

Krishnaswamier v. Swaminadhier.

The decree, as we understand it, gives the decree-holder a charge on the whole property to the amount of Rs. 48,000 or so, and a charge on an undivided two-thirds part of the property for a further sum, and on an undivided one-third for a still further sum. We have not been referred to any authority in support of the contention that the mortgagee is entitled to divide his security into undivided thirds and to say "I will sell one undivided third for the whole, and if that is not enough I will sell another undivided third for the balance, and if necessary the remaining undivided third."

He must take his security as the decree gives it to him, and though the Court may, of course, divide the property into lots so that no more than is necessary may be sold, these lots will not be undivided shares of the property.

There is no question here of enforcing the claims of a decree-holder against the personal liability of joint debtors; here we have simply a charge on the whole property for one sum, and on a part of the property for further sums, and the only order which in the circumstances of the case can, we think, properly be made is an order to sell so much of the property as is necessary for the sum for which the whole is liable, and then to proceed to sell so much as is necessary of undivided shares of the unsold property for the sums for which those shares are liable. We have heard argument to-day on the inapplicability of S. 622 to the matter in question, but we think that section is properly applicable. The order made is a judicial order not warranted by the section under which it purported to be made, and it is at least doubtful if the petitioner has any remedy under S. 311 of the C. P. C.

We set aside the order and direct resettlement of the sale proclamation in the light of the above remarks. We allow no costs as the application is made in the guise of an appeal which we think is inadmissible.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.*

Present:—Mr. Justice Sankaran Nair and Mr. Justice Abdur Rahim.

Salakshi .. .. Appellant (*Petr.-3rd Deft.*)

v.

Lakshmayee .. .. Respondent. (*Respt.-Pltff.*)

Salakshi v. Lakshmayee.

C. P. C., S. 266—Right of residence of Hindu widow in family house not liable to be attached and sold in execution of a decree against her.

The right of a Hindu widow to reside in the husband's family house is a right personal to the widow and is not liable to be attached and sold in execution of a decree against her.

Appeal from the decree and judgment of the District Court of Tanjore in A. S. No. 466 of 1907 presented against the order of the Court of the District Munsif of Tanjore on E P. No. 715 of 1906 in O. S. No. 241 of 1899.

T. V. Seshagiri Aiyar for appellant:—Widow's right of residence when defined is saleable—*Ramanadhan* v. *Rangammal*;[1] *Jayanti Subbiah* v. *Alamelu Mangammal*[2].

G. S. Ramachandra Aiyar for respondent, referred to S. 6 (*d*) C. P. C,; and S. 266, cl. (*l*), West and Butler, p. 252; *Gulab* v. *Bansidhar*[3] which lays down the inalienability of future right to maintenance though defined.

T. V. Seshagiri Aiyar referred to *Bansidhar* v. *Gulab*[4] on appeal from *Gulab* v. *Bansidhar*[3].

The Court delivered the following

JUDGMENT:—The question for decision is whether the respondent has any interest in the property—a dwelling house liable to be attached and sold in execution of a decree against her.

In a suit for maintenance brought by the respondent, a Hindu widow, against her step-son, his two sisters, wife and daughter, she obtained a decree against the 1st defendant, the step-son, for past and for future maintenance, which was made a charge on certain properties. There was also a decree for surrender to her of the 1st defendant's share of item No. 1 in the plaint for her residence

* A. A. A. O. No. 87 of 1907. 26th August 1908.

1. (1888) I. L. R. 12 M. 260.
2. (1902) I. L. R, 27 M. 4[illegible].
3. (1893) I. L. R. 15 A. 371.
4. (1894) I. L. R. 16 A. 44[illegible].

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during life. Her interest in that property is now attached by one of the other defendants in execution of the decree for costs decreed against her.

The Judge has held that she has no alienable interest, and that the attachment must, therefore, be set aside. In appeal, reliance is placed upon the dictum of *Muthuswamy Aiyar* J. in *Ramanadham* v. *Rangammal.*[1] That was a suit in which the question for decision was as to the right of a Hindu widow to live in the family house sold in execution of a decree for a debt binding on the family and purchased by a stranger in good faith but with notice of her claim to reside therein. In the course of his judgment negativing her claim *Muthuswamy Aiyar* J. observed: "A sale for the payment of her own debt would bind her interest in the house, whatever it might be." This expression of opinion is referred to without disapproval in *Jayanti Subbiah* v. *Alamelu Mangammal.*[2] The right of the widow is to live in the husband's family house. She has no right to insist on residing in any particular house, and ordinarily when living with the members of her husband's family she must accept such reasonable arrangements for her residence therein as they make for her. The interest is, therefore, obviously one restricted in its enjoyment to her, and it is this interest which the decree gives to the respondent. If this interest can be transferred, what is it that the purchaser takes? It is the right to reside in the portion allotted to her, with the other members of the family living in the family house. This could not have been contemplated by the Hindu Law-givers. The case may be different where land or other property is allotted to a widow in lieu of her claim for maintenance. It appears to us, therefore, that the respondent has been given a portion of the house only for her personal use, and her right of enjoyment cannot be transferred. Recognizing a right of sale might be oppressive to the family and would result in allowing her a right to choose a separate residence even where she is not entitled to do so under the Hindu Law.

We agree with the Judge and dismiss this appeal with costs.

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1. (1888) I. L. R. 12 M. 260.
2. (1902) I. L. R. 27 M. 50.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Sankaran Nair and Mr. Justice Abdur Rahim.

Chinna Ramana Gowd .. Appellant* (*Prisoner.*)

In re Ramana Gowd.

I. P. C., S. 211—False charge—Statement under S. 162, Cr. P. C., not false charge—Statement to Police of non-cognizable offence—Complaint to Village Munsif.

In order to constitute the offence of preferring a false charge, the charge must be made before an officer entitled to investigate. An accusation before an official who has nothing to do with the administration of justice, or an accusation of a non-cognizable offence before the Police, or of any offence before the Village Magistrate in respect of which he has no powers to investigate or send up for trial, cannot bring the accuser within the scope of S. 211, I. P. C.

A statement made in answer to questions under S. 162, Cr. P. C., by a Police officer, cannot be made the basis of a prosecution for an offence under S. 211, I. P. C.

Appeal from the sentence of the Court of Session of the Bellary Division in Case No. 26 of the Calendar for 1907.

T. Streenivas, *T. Arumainatha Pillai* and *A. Sanappah* for the appellant.

The *Public Prosecutor*—Contra.

The Court delivered the following

JUDGMENT :—The appellant complained to the Village Reddi that as he was returning to his house, he was robbed by certain persons, whose names were mentioned by him. The Village Reddi embodied this information in his reports to the Sub-Magistrate (Exh. *A*) and to the Inspector (Exh. *B*) who went to the appellant's village and took a statement from him (Exh. *C*) in the hand-writing of the Kurnum, which was read over to the appellant and signed by him. His complaint was, on inquiry by the Inspector, found to be false, and he was originally charged under the second part of S. 211, Indian Penal Code, with having instituted criminal proceedings by falsely charging the persons named by him with dacoity before the Police Inspector (Exh. *C*).

The Sessions Judge who first tried the case held that Exh. *C* was a statement taken under S. 162, Criminal Procedure Code, and that the appellant could not be prosecuted for an offence under S. 211, Indian Penal Code, for answering questions put to him by a Police officer making an investigation under S. 161 of the Criminal Procedure Code, and accordingly acquitted the

* Cr. A. No. 231 of 1908. 11th August 1908.

In re Ramana Gowd.

appellant. In his judgment, referring to a suggestion made before him by the Public Prosecutor that the complaint to the Village Magistrate might amount to an offence under S. 211, Indian Penal Code, he held, following the case of *In the matter of the Petition of Jamoona*,[1] that the false charge must be made to a Court or to an officer who has powers to investigate and send up for trial.

On appeal against this acquittal the learned Judges of this Court who heard the appeal held that "the case is on all fours with the case *Emperor* v. *Jonnalagadda Venkatarayudu*[2] which should have been followed by the Acting Sessions Judge."

The acquittal was set aside, and the Sessions Judge has now convicted the appellant of an offence under the second part of S. 211, Indian Penal Code, and the appellant has appealed from that conviction.

We are satisfied that Exhibit *C* cannot be treated as a complaint or charge. It is a statement made under S. 162, Criminal Procedure Code. The statements in Exh. *C* are answers to questions asked by the Police Inspector, often as if in cross-examinations. We agree with the Acting Sessions Judge that Exh. *C* cannot be made the basis of a prosecution for an offence under S. 211, Indian Penal Code.

The next question is whether the statement to the Village Magistrate can be treated as a false charge or as an institution of a criminal proceeding.

In the judgment setting aside the acquittal, it is stated that the case is on all fours with the case of *Emperor* v. *Jonnalagadda Venkatarayudu*[2]. This is clearly an error. In that case the question for consideration was whether the oral information given was "information" under S. 182, Indian Penal Code. That case had reference to S. 211, Indian Penal Code, and we have, therefore, ed the appellant's pleader to argue whether the information the Village Magistrate was a 'charge' or the institution minal proceeding under S. 211, Indian Penal Code.

In *Karim Buksh* v. *Queen-Empress*[3] it was decided by a Full Bench of the Court that a false charge to the Police of a

1. (1881) I. L. R. 6 C. 620. 2. (1905) I. L. R 28 M. 565.
3. (1888) I. L. R. 17 C. 574.

In re. Ramana Gowd.

cognizable offence is the institution of criminal proceedings under S. 211, Indian Penal Code, on the ground that from the time a person makes the charge the control of investigation or enquiry passes out of his hands into the hands of the constituted authorities, and that for the same reason a charge to the Police of a non-cognizable offence can hardly be called the investigation of criminal proceedings. See also *Queen Empress* v. *Nunjunda Rao*[1] and *The Queen* v. *Subbanna Gaundan*[2].

The Village Reddi, like the Police officer to whom information of a non-cognizable offence is given, has no power to make any investigation in a case of dacoity, and for the reason given in *Karim Buksh* v. *Queen Empress*[3], therefore, the appellant cannot be held to have instituted any criminal proceedings.

Has he then made any false charges? The only direct authority on the point brought to our notice is the case of *In the Matter of the Petition of Jamoona*[4]. In that case a woman charged a Non-Commissioned Officer with the offence of rape before the Station Staff Officer who had neither Magisterial nor Police powers. The High Court there held that S. 211, I. P. C., will not apply on the ground "that the false charge must be made to a Court or to an officer who had powers to investigate and send up for trial."

It appears to us that this decision is right. Though the section does not state that the charge must be made before any officer entitled to investigate, that appears to be the reasonable conclusion. It is obvious that accusing a person of the commission of an offence, or giving information against him to a person other than an official, cannot be treated as a 'charge' under that section. An accusation before an official who has nothing to do with the administration of justice seems to stand on the same footing. In our opinion the test is: Was the appellant setting the criminal law in motion against the persons against whom he gave information? Under the Code he may set the criminal law in motion by preferring a charge to the Police of a cognizable offence (S. 154) or by preferring a complaint to the Magistrate (S. 191). It is not the appellant but the report of the Village Magistrate which set the criminal law in motion, and we are, therefore, of

1. (1896) I. L. R. 20 M. 79.
2. (1862) 1. M. H. C. 30.
3. (1888) I. L. R. 17 C. 574.
4. (1881) I. L. R. 6 C. 620.

opinion that the appellant cannot be said to have made a false charge under S. 211.

On this ground, we set aside the conviction, allow the appeal, acquit the accused, and direct him to be set at liberty.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Abdur Rahim.

Kondeti Kana Row, minor, by his mother and next friend Ramanna .. Appellant* (*Plaintiff*).

v.

Lolle Nutramma and another .. Respondents (*Defendants*).

Kana Row v. Nutramma.

C. P. C., S. 13—Estoppel by judgment—Fraud—Sale with intent to effect fraud—Claim in execution by purchaser—Decree in favour of purchaser—Subsequent suit by purchaser for possession—Defence that sale was sham.

In execution of a decree against the father of the second defendant plaintiff, by his next friend laid claim to the suit property and obtained a decree declaring him to be the owner as purchaser from the second defendant. To that suit, the defendant was a party. The plaintiff now brought this suit for possession on the strength of the declaration so obtained. In the prior suit the Court found that the property was the self-acquisition and separate property of the defendant purchased by him after separation from his father.

Held per *Curiam*:—The decree operated as *res judicata* between the plaintiff and the defendant who were parties to the suit, and it was not open to the defendant now to set up that the sale deed by him to the plaintiff was nominal and colourable with the intention of defrauding the creditors.

Per *Abdur Rahim* J:—It is a clear and well established principle of law that where the decree of a Court has been passed upholding a certain transaction between the parties to a suit, neither the plaintiff nor the defendant will be allowed afterwards to say that the decree was the result of a collusive arrangement arrived at by them in order to carry out a scheme of fraud and that it should therefore be treated as a nullity and the state of things which existed previously to the passing of such decree be restored. Where two persons have combined to defraud a third person and succeeded in their effort without obtaining the decree of a Court, the Court will not permit one of the parties to such fraud to show that the transaction between him and the other party to the fraud was not really what it purported to be and that it does not therefore bind them. [*Pethaperumal* v. *Muniandy*[1] distinguished.]

Second appeal from the decree of the Additional Subordinate Judge's Court of Godavari at Rajahmundry in A. S. No. 442 of 1904 presented against the decree of the Court of the District Munsif of Cocanada in O. S. No. 48 of 1903.

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*S. A. No. 1331 of 1905. 8th September 1908.

1. (1908) I. L.R. 35 C. 551 (P. C.)

P. Nagabhushanam for appellant.

T. Ramachandra Rao for respondents.

The Court delivered the following

JUDGMENT:—*Miller* J.—It is necessary to set out in some detail the facts found in this case.

In execution of a decree against the father of the 2nd defendant the house in dispute was attached; the plaintiff, by his next freind, laid claim to the property as vendee of the 2nd defendant, and obtained a decree declaring him to be the owner. In the suit in which this decree was obtained he and the attaching creditor and the 2nd defendant were parties, the 2nd defendant being then the 3rd defendant. The Court found that the property was the self-acquisition and separate property of the 2nd defendant, Mondi Venkanna, purchased by him after separation from his father.

On the strength of the declaration and his title as vendee, the plaintiff, by his next friend, now sues for possession of the house and site, and the 2nd defendant, who is in possession, resists the suit on the ground that the sale-deed was nominal and colorable, and executed because the 2nd defendant "had to pay certain debts at the time." The Court of first instance has found that the sale to the plaintiff was not valid or supported by consideration; that the 2nd defendant has remained in possession after the sale-deed as before it; and that money borrowed in the plaintiff's name for the reconstruction of the house after a fire was paid off by, and borrowed from, the 2nd defendant. The lower appellate Court concurs in these findings, and both Courts have dismissed the suit, the question of law raised in the appeal memorandum to the lower appellate Court (grounds 5 & 6) not being dealt with by the Subordinate Judge.

Finally, it is not found by either Court that the 2nd defendant has, or ever had, any creditor who has been defrauded by the colorable sale to the plaintiff. On the finding of the Court in the former suit, the creditor of the 2nd defendant's father could, in no circumstances, have had recourse to this property, whether it had, or had not, been sold to the plaintiff.

In these circumstances the plaintiff appeals, contending that the 2nd defendant, being a party to a collusive decree, cannot set up the collusion to defeat the effect of the decree; and the

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respondents, on the other hand, contend that no fraud was effected by the decree, and consequently, the plaintiff can rely on it only as estopping the 2nd defendant from contesting it, and, inasmuch as the plea of *res judicata* was not taken in the Court of first instance, effect cannot be given to that plea now. It is also contended for the respondents, and not denied on behalf of the appellant, that, as the law has been laid down by this Court, a purchaser cannot demand possession of the purchased property until he has paid the purchase-money.

Now, it was the case of the 2nd defendant that the nominal sale was intended to shield the property from his creditors. That is what he alleged in his written statement. Upon that case the first issue was drafted, and upon that case the Subordinate Judge in the appeal propounded the question for his decision. We must take it, in these circumstances, that the keeping up of the sham in the suit No. 218 of 1894, though it may not have deprived the 1st defendant in that suit of the property, was none the less a fraudulent and collusive proceeding intended to carry out the fraudulent intention in pursuance of which the sale-deed was originally executed and registered.

The 2nd defendant is now alleging his own fraud to escape from the consequence of the decree thus fraudulently and collusively obtained, and on the authorities in this Court he cannot be allowed to succeed—*Venkatramanna* v. *Viramma* [1], *Rangamma* v. *Venkatachari*[2]; *Yarmati Krishnayya* v. *Chandru Papayya*.[3] I do not think *Petherperumal Chetty* v. *Muniandi Servai*[4] overrules these authorities. In that case the question of the effect of a decree between the parties is not discussed. We must, therefore, in my opinion, proceed in the view that the decree is a subsisting and effectual decree, and that, as between himself and the 2nd defendant, the plaintiff is the owner of the house and site in dispute. He is, therefore, entitled to possession, but both Courts have found that he has not paid the price fixed in the sale deed. I have had some doubt whether the plaintiff ought to be allowed to succeed without now paying the price before obtaining possession, but as I find that the decree in the former suit was based on a finding that he had paid the price, or at any rate a large portion of it, I think

1. (1886) I. L. R 10 M. 17.
2. I. L. R. 18 M. 378.
3. (1897) I. L. R. 20 M. 326.
4. (1908) I. L. R. 35 C. p. 559.

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that to direct him to do so now would in effect be to call in question the decree, which is just what neither party can be permitted to do.

I would, therefore, reverse the decrees of the Courts below, and give the plaintiff a decree, but, in the circumstances, without costs.

Abdur Rahim J.—It is a clear and well-established principle of law that when the decree of a Court has been passed, upholding a certain transaction between the parties to a suit, neither the plaintiff nor the defendant will be allowed afterwards to say that the decree was the result of a collusive arrangement arrived at by them in order to carry out a scheme of fraud, and that it should, therefore, be treated as a nullity, and the state of things which existed previously to the passing of such decree be restored. And so also when two persons have combined to defraud a third person, and succeeded in their effort without obtaining the decree of a Court, the Court will not permit one of the parties to such fraud to shew that the transaction between him and the other party to the fraud was not really what it purported to be, and that it does not therefore bind him.

In the first case, the decree is regarded as a subsisting and effectual decree, so that the question covered by it is treated as *res judicata*, and in the second case, the Court refuses it on the grounds of public policy to help a man who, by his act, has imposed upon another to get rid of the consequences of that act as against himself. The subject is fully discussed in *Chenvirappa* v. *Puttappa*[1]; and the law as explained therein has been accepted in *Rangammal* v. *Venkatachari*.[2] That being so, the defendants, in the suit out of which this second appeal has arisen, have no proper answer to make to the plaintiff's claim. Sometime between May 1893 and June 1894 a creditor of the 2nd defendant's father, in execution of a decree obtained by him, attached the property which is the subject-matter of this suit, alleging that it belonged to his judgment-debtor. Thereupon the present plaintiff preferred a claim to the property, stating that he had purchased it under a deed of sale, dated the 21st May 1893, from the 2nd defendant who owned it as his separate and self-acquired property. He succeeded in establishing this claim in O. S. No. 218 of 1894 with the aid of the

1. (1887) I. L. R. 11 B. 708.

2. I. L. R. 18 M. 378.

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2nd defendant who was impleaded in that suit as the 3rd defendant, obtaining a decree declaring his right to the property, with the result that it was released from attachment. It is argued on behalf of the respondents that it being found in O. S. No. 218 of 1894 that the house in question was the separate property of the 2nd defendant, there was no necessity for propounding the nominal and colorable deed of sale executed by the 2nd defendant in favor of the plaintiff. But even if that be so, the conveyance was put into use in order to put off the creditor of the 2nd defendant's father, and that, in my opinion, is sufficient to estop the 2nd defendant from saying that between himself and the plaintiff the sale was a sham Further, as I have said, there being a decree of the Court in favor of the plaintiff declaring the validity of the sale in the presence of, and with the concurrence of, the 2nd defendant, the question is concluded once for all so far as those two persons are concerned. The learned vakil for the respondents, however, urges that the plaintiff is not, in any case, entitled to have possession of the property without paying the amount of consideration mentioned in the deed of sale, as it has been found that no part of the consideration was paid by him. But I do not think that this contention is well founded. In the first place, it is the case of the defendants themselves that it was never intended that any money should be paid. And the law being that, in circumstances such as these, the effect of the apparent transaction, especially when, as in this case, it has been confirmed by a decree of the Court, cannot be got over by shewing that the real transaction was something different, if we were now to compel the plaintiff to pay the purchase-money as a condition precedent to his recovering possession of the property, the force of the rule would be materially impaired. The decision in *Subramaniya Aiyar* v. *Poovan*[1] cited at the bar is not, in my opinion, relevant to the question. That was the case of the buyer of a certain property under a *bona fide* deed of sale seeking to recover possession of it from the vendor who claimed to retain possession by virtue of a lien for his unpaid purchase-money. For these reasons, I agree that the judgments of both the lower Courts should be reversed and the suit of the plaintiff be decreed, but that, in the circumstances of the case, each party should bear his own costs throughout.

1. (1902) I. L. R. 27 M. 28.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present : Mr. Justice Benson and Mr. Justice Munro.

The Regulation Collector of Uthumalai Estate } .. Appellant* (*Respondent.*)

v.

R. Subbier .. Respondent (*Petitioner-claimant.*)

Collector of Uthumalai v. Subbier.

Court of Wards—Rules—Claim made within time—Reference by Decree Collector—Exclusion of time—Limitation Act, Ss. 4 and 14.

Where there were both a Regulation Collector and a Decree Collector, and a claim was preferred to the Regulation Collector in respect of a debt before its recovery was barred by limitation, the claim is not liable to be dismissed as barred on the ground that the reference by the Decree Collector to the Civil Court was made after the expiry of the limitation period in consequence of the delay that happened in the disposal of the claim by the Regulation Collector.

The reference by the Decree Collector to the Court is not to be regarded as the institution of a suit by the claimant, and S. 4 of the Limitation Act has no application to it.

The question that could properly be referred is whether the claim was legally enforceable when it was made to the Regulation Collector and not whether it was legally recoverable on some subsequent date arbitrarily fixed by the Regulation Collector.

Obiter :—The case will be different if there was no Decree Collector at all, but there was only the Regulation Collector, when the suit will have to be filed before it is barred.

A Regulation Collector is not a Court "which from defect of jurisdiction was *unable* to entertain the claim" within the meaning of S. 14 of the Limitation Act, and S. 14 will not avail for the exclusion of the time taken before the Regulation Collector.

Appeal from the order of the District Court of Tinnevelly in C. M. A. No. 5 of 1907 presented against the order of the Court of the District Munsif of Ambasamudram in M. P. No. 3207 of 1906.

C. F. Napier for appellant.

P. R. Sundaraier for respondent.

The Court delivered the following

JUDGMENT :—This appeal relates to a claim duly preferred to the Regulation Collector of the Uthumalai estate for a sum due to the claimant by the estate. The claim was made within

* A. A. A. O. No. 62 of 1907. 6th May 1908

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six months of the publication of a notification under S. 30 of Regulation V of 1804 as amended by Madras Act IV of 1899, and at the time when it was made in December of 1901 its recovery by suit in a Civil Court was not barred by the Limitation Act.

A Collector, for the purpose of executing decrees which were in force against the estate, generally called a Decree Collector, as opposed to a Regulation Collector, was appointed on the 20th September 1901.

A new Regulation Collector was appointed on the 30th October 1901, and, as already stated, the present claim was made to the Regulation Collector on the 1st December 1901. On the 17th September 1902 the Decree Collector called on the Regulation Collector under Rule 3 of the rules framed under the Act "to furnish him with full particulars of all claims notified to him under S. 30." It was the duty of the Regulation Collector to "thereupon furnish the (Decree) Collector with such particulars" and to state in regard to such claim whether it was allowed or disallowed in whole or in part.

This, however, the Regulation Collector did not do.

So far as appears from the record he kept the claim pending before him until 1904, and then refused to pay it on the ground that a suit for its recovery had become barred at the end of 1903, though admittedly a sum of Rs. 255-8-0 was legally due and recoverable when the claim was made in 1901. His decision was upheld by the Court of Wards, and the Regulation Collector then reported to the Decree Collector that he had disallowed the claim as time-barred.

The Decree Collector then, under Rule 7, referred the matter to the Civil Court for decision, and both the District Munsif and the District Judge held that there was no bar by limitation. It is against this order of the Courts that the present appeal is made.

The construction of the Act and of the rules framed under it are not free from any difficulty, but we think it is clear that there is no bar by limitation in this case.

This is not a case in which no Decree Collector was appointed but only a Regulation Collector. In such a case, if the claim

was disallowed by the Regulation Collector and the Court of Wards, the claimant would have no remedy except to file a suit in the Civil Court as contemplated in S. 40 of the Act. If such a suit were instituted, no doubt, S. 4 of the Limitation Act would bar it unless it were instituted within the time allowed by law, and the time during which the claim was pending before the Regulation Collector could not be excluded since there is no provision in the Act for the exclusion of such time, and S. 14 of the Limitation Act cannot be relied on to justify the exclusion, since it cannot be said that the Regulation Collector is "a Court which from defect of jurisdiction was unable to entertain" the claimant's suit. Provision for the exclusion of such time seems to be obviously required for the protection of both wards and claimants, for in the absence of such a provision each prudent claimant will have to file a suit in the Civil Court before his claim is barred even though the Regulation Collector may be eventually prepared to discharge it.

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The present, however, is not a case of this kind. There is no suit in the Civil Court, and there is no need for any such suit in order to obtain the decision of the Court on the validity of the claim. Here both a Regulation Collector and a Decree Collector were in existence before the claim was made. The claim was, therefore, bound to be placed before the Civil Court for decision unless the Decree Collector was prepared to pay it. The only question in regard to limitation that could properly be placed before the Civil Court was whether the claim at the time that it was made to the proper authority under the Act was or was not one that was irrecoverable at law. If it was not irrecoverable when made, and if the sum was then otherwise legally due, it was the duty of the Decree Collector to admit the claim and to discharge it to the extent of assets in his hand and with due regard to the provisions of the Act relating to the discharge of proved debts. If the Decree Collector was in doubt, or if the Regulation Collector, on behalf of the estate, disputed the claim, it was the duty of the Decree Collector to refer the matter for the decision of the Civil Court and to be guided by its decision. The reference by the Decree Collector to the Court is not to be regarded as the institution of a suit in the Court by the claimant as plaintiff, against the Regulation Collector as defendant. It is a reference made to the Court under a special provision of law,

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and, therefore, S. 4 of the Limitation Act has no application. The question that could properly be referred is whether the claim was legally enforceable at the time when it was made to the Regulation Collector, not whether it was legally recoverable on some subsequent date arbitrarily fixed by the Regulation Collector. There is no ground for the contention that it is open to the Regulation Collector to keep the claim pending before him until a suit on it would be barred and then to refuse to pay it on the ground that it had become barred.

We dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

A. Narasimhayya of Bidamannur .. Complainant.*

v.

A. Venkatasawmi and 2 others .. *Accused.*

Cr. P. C., S. 195 (a)—Penal Code, S 182—Village Magistrate not subordinate to Sub-Magistrate—"Subordinate officer": meaning of.

A Village Magistrate is not an officer subordinate to a Sub-Magistrate within the meaning of S. 195, Cr. P. C. The subordination of one officer to another should arise either by express enactment or from the fact that both public servants belong to the same department, one being superior in rank to the other.

[*Regina v. Periannan and Narain*[1] distinguished and doubted].

Narasimhayya v. Venkatasawmi.

Case referred for the orders of the High Court under S. 438 of the Criminal Procedure Code, by the District Magistrate of Guntur.

The question in the case was whether a Village Magistrate is subordinate to a Sub-Magistrate, within the meaning of S. 195, Cr. P. C., so as to empower the Sub-Magistrate to grant sanction for a false report of theft made to the Village Magistrate.

The Ag. Public Prosecutor (K. Narayana Rao) in support of the reference.

T. Prakasam for the 2nd and 3rd accused.

L. A. Govindaraghavier for *C. Venkatasubbaramiah* for the complainant.

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* Cr. R. C. No. 213 of 1908 C. R. No. 44 of 1908. 2nd September 1908.

1. (1881) I. L. R. 4 M. 241.

The Ag. Public Prosecutor (*K. Narayana Rao*):—The observation in *Reg. v. Periannan and Narrain* [1] is *obiter*. In *Madhava* v. *Subba*[2] it was held that a District Magistrate could not withdraw a case from the file of a Village Magistrate. S. 528 covers most of such cases. Still some cases remain unprovided for —*Sivakolandai* v. *Arumugan.*[3] The Village Magistrate is not a Magistrate within the Criminal Procedure Code, Sec. 1, Cl. (*b*) See also *King-Emperor* v. *Thammanna Reddi*[4]; *Abdul Rahman* v. *The Emperor* [5] following *Haibatkan* v. *The Emperor.* [6] The Police are held not to be subordinate to the Collector.

T. Prakasam relied on *Regina* v. *Periannan and Narain*[1] and *Regina* v. *Sheik Beari*[7].

The Court passed the following

ORDER :—A case of theft was reported to a Village Munsif who sent the usual reports to the Police and the Sub-Magistrate. The Police submitted a referred charge sheet and asked the Sub-Magistrate for sanction to prosecute the complainant. The Sub-Magistrate sanctioned the prosecution of the complainant for an offence under S. 182, I. P. C.

Under S. 195 (*a*), Cr. P. C., no Court shall take cognizance of an offence under S. 182, I. P. C., except with the previous sanction or on the complaint of the public servant concerned or of some public servant to whom he is subordinate. In the present case the public servant concerned was the Village Munsif, and he took no action. The sanction granted by the Sub-Magistrate will, therefore, be a good sanction only if the Village Munsif is subordinate to the Magistrate. Our attention has been drawn to *Regina* v. *Periannan and Narain.*[1]

There, one of the grounds on which the sanction was submitted to be illegal was that the Sub-Magistrate had no power to give sanction as he was not the public servant to whom the information was given. In dealing with this the learned Judges remarked as follows :—"We think all was done that was necessary. The public servant himself complained, which is sufficient to satisfy the requirements of the section, and if it were not

1. (1884) I. L. R. 4 M. 241.
2. (1891) I. L. R. 15 M. 94.
3. (1902) I. L. R. 26 M. 394.
4. (1901) I. L. R. 25 M. 667.
5. (1907) 7 C. L. J. 371.
6. (1905) I. L. R. 33 C. 80.
7. (1886) I. L. R. 10 M. 232. (F. B.)

Narasimhayya v. Venkataswami.

so, the Village Magistrate may be said to be subordinate to the 2nd Class Magistrate, and the sanction of the 2nd Class Magistrate would be sufficient." That case is not exactly on all fours with the present case, in as much as a complaint seems to have been made by the Village Magistrate to whom the information was given. It was, therefore, unnecessary to decide in that case whether the Village Magistrate was or was not subordinate to the Sub-Magistrate, and no reasons were given for the opinion that the Village Magistrate may be said to be subordinate to the Second class Magistrate. The subordination of one public servant to another may arise either from express enactment or from the fact that both public servants belong to the same department, one being superior in rank to the other. We are not aware of any enactment which makes Village Munsifs subordinate to the Sub-Magistrates. The Criminal Procedure Code does not do so, nor do Regulations XI of 1816 and IV of 1821. Village Munsifs and Sub-Magistrates do not belong to the same department. We are unable, therefore, to see how Village Munsifs can be said to be subordinate to Sub-Magistrates. We, therefore, revoke the sanction granted by the Sub-Magistrate in the present case.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

Kuppuswami Chetty .. Appellant*
(*Defendant*).

v.

Samudra Vijia Nainar .. Respondent
(*Plaintiff*).

Kuppuswami v. Vijia Nainar.

Appellate Court, functions of—C. P. C., Ss. 561, 577—Prayer for possession and in the alternative for the return of the purchase-money—Decree for possession in the first Court—Jurisdiction of Appellate Court to modify the decree by granting the alternative relief in the absence of memo of objections.

The plaintiff sued for possession of property or, in the alternative, the return of the purchase-money. The first Court gave a decree for possession. The District Judge on appeal held that the suit for possession was barred by S. 317, C. P. C., but gave a decree for money, which he found the plaintiffs to have paid. There was no memorandum of objections under S. 561, C.P.C.

Held: that the plaintiff having got his primary relief, there was nothing for him to file a memo under S. 561, C. P. C., and that it was within the jurisdiction of the appellate court to modify the decree in the way it did. *Kulaikada Pillai* v. *Viswanatha Pillai*[1] distinguished.

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* S. A. No. 1308 of 1905. 11th September 1908.

1. (1904) I. L. R. 28 M. 229.

Second Appeal from the decree of the District Court of South Arcot in A. S. No. 34 of 1905 presented against the decree of the Court of the District Munsif of Cuddalore in O. S. No. 461 of 1903. Kuppuswami v. Vijia Nainar.

T. R. Ramachandra Aiyar for appellant.

V. C. Seshachariar for respondent.

The Court delivered the following

JUDGMENT:—*Munro* J.—The plaintiff's case was that he purchased the plaint house at a court sale for Rs. 360, benami in the name of the defendants. He sued to recover possession from the defendant or, in the alternative, for the purchase-money paid by him for the house. The District Munsif gave the plaintiff a decree for possession. On appeal, the District Judge held that the plaintiff's suit for possession was barred by S. 317, C.P.C. He found, however, that the purchase-money had been paid by the plaintiff and gave him a decree for Rs. 360. In second appeal by the defendant it is contended that he should not have granted the alternative relief inasmuch as the plaintiff did not put in any memorandum of objections under S. 561, C. P. C. In support of this contention *Kulaikada Pillai* v. *Viswanatha Pillai* [1] is cited.

I am of opinion that the decree of the District Judge is right. The primary or major relief asked for by the plaintiff was delivery of the property. Having obtained this relief in the first Court he had no ground for appealing and therefore no ground for putting in a memorandum of objections under S. 561, C.P.C. The District Judge found that the plaintiff was not entitled to the major relief granted him by the District Munsif. There was nothing, in my opinion, to prevent him from giving a decree for the minor relief on finding that the plaintiff was entitled to it. The case would have been different if the District Munsif had refused the prayer for possession and had given a decree for the purchase-money. Had the defendant then appealed, the plaintiff, if he wished to have the decree altered to one for possession, would have been bound to put in a memorandum of objections regarding the refusal of his prayer for possession; for the rejection of that, his major prayer, gave him good ground for appealing.

1. (1901) I. L. R. 28 M. 229.

Kuppuswami v. Vijia Nainar.

The case *Kulaikada Pillai* v. *Viswanatha Pillai*[1] is clearly distinguishable. In that case the plaintiff claiming title under a sale from the 3rd defendant who was a vendee from the widow of a brother of the 1st and 2nd defendants sued all these defendants for possession and in the alternative for return by the 3rd defendant of the purchase-money. The District Munsif held that the claim for possession was barred by the adverse possession of the 1st and 2nd defendants, and gave a decree for the purchase money against the 3rd defendant. The 3rd defendant appealed, making defendants Nos. 1 and 2 and the plaintiff, respondents. The Subordinate Judge found that there was no bar by the adverse possession on the part of the defendants Nos. 1 and 2 and, although the plaintiff had put in no memorandum of objections, dismissed the suit for purchase-money against the 3rd defendant, and gave the plaintiff a decree for possession. The 1st and 2nd defendants then appealed to the High Court objecting to the reversal of the decree of the District Munsif, so far as it was in their favour. From the above it is clear that the plaintiff could have objected in appeal to the decree of the District Munsif inasmuch as it refused him the major relief he had claimed, namely, possession. He was, therefore, bound if he wanted to obtain that relief in the appeal filed by the 3rd defendant to put in a memorandum of objections I, therefore, dismiss this second appeal with costs.

Abdur Rahim J:—I think the contention of the appellant is untenable on the face of it. The plaintiff, who is the respondent in this second appeal obtained a decree in the District Munsif's Court for the delivery of possession of the property which he had bought, the very relief which he sought by his suit. He was quite content with what he got, but the defendant appealed, and the appellate Court held that the plaintiff was not entitled to recover the property but only its value as alternatively prayed for in the plaint. It seems difficult to comprehend that the plaintiff should be required by law, as contended for by the learned pleader for the appellant, to file a special memorandum of objections against a decree which he had sought and obtained. He did not want to take any objection to that decree, and, therefore, S. 561, C. P. C., can have no application. The order of the

1. (1904) I. L. R. 28 M. 229.

appellate Court varying that decree was quite within its competence under S. 577, C. P. C. Kuppuswami v. Vijia Nainar.

I, therefore, agree that this appeal should be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Miller and Mr. Justice Pinhey.

Janaki Ammal .. Appellant*. (*Defendant*).

v.

Narayanaswami Iyer .. Respondent (*Plaintiff*).

C. P. C., S. 503—Accounts—Jurisdiction of Subordinate Court to call upon Receiver appointed by High Court to furnish accounts. Janaki Ammal v. Narayanaswami.

A subordinate Court has no jurisdiction to call upon a reciever appointed by a High Court pending an appeal before it to furnish accounts or to make any order or give any direction as supplementary to those given by the High Court without authority given by the High Court.

Appeal from the order of the Subordinate Judge's Court, Mayavaram, in O. P. No. 182 of 1908 (O. S. No. 30 of 1907) and petition under S. 622, C. P. C., praying the High Court to revise the said order and petition.

J. L. Rosario and *M. Subramania Aiyar* for appellant.

C. Madhavan Nair, *T. R. Ramachandra Aiyar*, *T. R. Krishnasami Aiyar* and *G. S. Ramachandra Aiyar* for respondents.

The Court delivered the following

JUDGMENT:—We think there is no appeal under S. 588, Cl. (24), of C. P. C.—vide *Rani Keshobati Kumari* v. *Mac Gregor.*[1] We dismiss the appeal with costs.

But we have no doubt that the Subordinate Judge's decision to make the order is a judicial order (he considers the question whether he has jurisdiction to make it and decides in favour of the jurisdiction) and one which can be revised under S. 622, C. P. C. We think the Subordinate Judge had no jurisdiction to call upon the first defendant to furnish accounts. She was appointed receiver by the High Court pending an appeal, and, in our opinion, no other Court had power to make any order or give any direction as supplementary to those given by the High

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* A. A. O No. 131 of 1908. 19th September 1908.
C. R. P. No. 394 of 1908.

1. (1908) 12 C. W. N. 648.

Janaki Ammal v. Narayanaswami.

Court, or without authority given by that Court. There was no proceeding pending before the Subordinate Judge—*Ramanadhan Chetty v. Narayanan Chetty*[1]—and the order of the High Court informing him of the appointment does not give him jurisdiction to give directions to the receiver.

We set aside the order with costs in both Courts.

IN THE HIGH COURT OF JUDICATURE AT MADRAS (*FULL BENCH.*)

Present:—Sir Arnold White, *Kt.*, Chief Justice, Mr. Justice Sankaran Nair and Mr. Justice Pinhey.

Damaraju Narasimha Rau	..	Appellant (*Plaintiff*).
v.		
Thadinada Gangaram and others	..	Respondents (*Defendants 2 to 5 and 1st defendant's legal representatives.*)

Narasimha Rau v. Gangaram.

Limitation Act, Arts. 29, 49, 62, 120.—Suit for value of property attached and sold wrongfully—Cause of action—C. P. C., S. 283.

Per *Full Bench* (*Sankaran Nair* J. *dissentiente.*) A suit for the value of paddy wrongfully attached by defendants in execution of a decree and sold is governed by Art. 29, and limitation begins to run from the date of the wrongful seizure.

Per *Sankaran Nair* J.:—The article applicable is either Art. 62 or Art. 120, and the cause of action arises from the date of distribution of the sale proceeds among the defendants.

Per *Chief Justice.*—Art. 29 is not restricted in its application to claims for consequential damages.

Per *Chief Justice* and *Pinhey* J.:—S. 283, C. P. C., and Art. 11 of the Limitation Act do not affect the scope of the other articles of the Limitation Act.

Second Appeal from the decree of the District Court of Godavari in A. S. No. 71 of 1904 presented against the decree of the Court of the District Munsif of Ellore in O. S. No. 219 of 1903.

The facts are fully set forth in the judgment of the Chief Justice.

T. V. Seshagiri Aiyar for appellant.

V. Ramesam for respondent.

T. V. Seshagiri Aiyar:—As against 4th defendant, the csuse of action arose on the date of payment. In his case, either

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* S. A. No. 480 of 1905. 18th August 1908.

1. (1903) I. L. R. 27 M. 602.

Narasimha Rau v. Gangaram.

Art. 62 or 120 would apply—*Rupabai* v. *Audimula*[1]; see also *Luxmi Priya* v. *Ramakanta*.[2] There is a distinction between claim for loss of goods, and loss for damages owing to attachment. The combination of the claims might affect the question of limitation. *Jagjivan* v. *Gulam*.[3] In *Murugesa Mudaliar* v. *Jotharam Davay*,[4] the question of limitation did not arise. *Manavikraman* v. *Koya*[5] applies Art. 49. Till the custody of the Court ceases, there is no limitation,—*Raja of Venkatagiri* v. *Isakapalli Subbiah*[6]; *Ramaswamy* v. *Muthuswamy*.[7] Art. 62 is the proper article applicable- see *Aiyappa Reddi* v. *Kuppuswamy Reddi*[8]; *Mahomed Wahab* v. *Mahomed Ameer*.[9] Title being declared by judgment, title dates back—*Harisankar* v. *Naran Karsan*[10]; *Mahomed* v. *Pitambar*[11]; *Amb* v. *Ketilamma*[12]; *Kristnam Soorayya* v. *Pathma Bee*[13]. Again, right of action is suspended on the principle of *Lakhanchundersen* v. *Madhusudansen*[14]; *Ranisurnomayee* v. *Shooshee Mokhee Burmonia*[15]; *Rangayya Appa Row* v. *Bobba Sriramulu*.[16] There is nothing against the party choosing his own starting point when there are several starting points for different purposes Otherwise, great inconvenience and injustice might result.

V. Ramesam:— Under S. 295, C. P. C., the applicant ratifies the attaching creditor's acts. Frame of the plaint is immaterial. The tortious act was the wrongful attachment of goods. Art. 62 applies to money. Art. 29 applies to other moveables. *Rupabai* v. *Audimula*[1] says Art. 29 does not apply to money. Arts. 17 to 43 apply to torts. Arts. 62 and 120 are not applicable when earlier articles apply. Moveables differ from immoveables in that present possession is takne away of moveables when attached. *Multan Chand* v. *Bank of Madras*[17] is relevant. It is inconsistent with *Jagjivan* v. *Gulam*.[3] In *Rupabai* v. *Audimulam*,[1] money deposited as the judgment debtor's drawing alone was wrongful. In *Manavikraman* v. *Koya*,[5]

1. (1887) I.L.R. 11 M. 345.
2. (1902) I.L.R. 30 C. 440.
3. (1883) I.L.R. 8 B. 17.
4. (1889) I.L.R. 22 M. 478 and 23 M. 621.
5. (1895) I. L. R. 19 M. 83.
6. (1902) I.L.R. 26 M. 410.
7. (1906) I.L.R. 30 M. 12.
8. (1904) I.L.R. 28 M. 208.
9. (1905) I. L. R. 32 C. 527.
10. (1893) I. L R 18 B. 260.
11. (1874) 21 W. R. 435.
12. (1890) I. L. R. 14 M. 23.
13. (1905) I. L. R 29 M. 151.
14. (1907) I. L. R. 35 E. 209 (F. B.)
15. (1868) 12 M. I. A. 244.
16. (1903) I. L. R. 27 M. 143 (P. C.)
17. (1903) I. L. R. 27 M. 346.

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It was immaterial which article applied. You cannot split up a wrong—*Ramanarain* v. *Umrao Singh.*[1] Difficulty of assessment is no ground for keeping off limitation—*Ramasing* v. *Bhottro Manjee*[2]; see also S. A. 1095 and 1096 of 1904 (*Benson* and *Wallis* JJ.); *Mitra*, p. 824, quoting a Central Provinces case.

Syed Mahomed Yusufuddin v. *Secretary of State*[3] is also in point. Ignorance of rights is no ground to postpone limitation. *Rangayya Appa Row* v. *Bobba*[4] and other cases have no application.

T. V. Seshagiri Aiyar replied.

The Court delivered the following

JUDGMENTS :—*The Chief Justice.*—The question for determination in this appeal is whether the plaintiff's suit is barred by limitation. For the purpose of this question the material facts and dates are as follows:

Defendants Nos. 1 to 3 brought a suit against the 5th defendant, and on December 10th 1899 attached certain paddy before judgment. The plaintiff put in a claim petition with respect to the paddy. On March 8th, 1900, this petition was dismissed. On March 26th, 1900, the plaintiff brought a suit under S. 283 of the Code of Civil Procedure to establish his right to the property. On November 18th, 1901, he obtained a declaration as to his right. On February 7th, 1903, this declaration was affirmed on appeal. In the meantime, the property had been sold by the Court, and on May 15th, 1900, the proceeds had been distributed to the defendants, the 4th defendant having received his share as a party entitled to rateable distribution. On June 1st 1903, the present suit for a refund of the money by the defendants was instituted. The plaintiff contends that time began to run from the date of the distribution of the proceeds of the sale of the attached property. If this is so, and the period of limitation is 3 (three) years—deducting (as it is conceded the plaintiff is entitled to deduct) the time when the Court was closed—the suit is in time.

The Munsif held that time began to run from the date of the attachment (December 10th 1899), that the article of the 2nd Schedule to the Limitation Act which applies was article 49, and that the suit was time-barred. The District Judge held that the

1. (1907) I. L. R. 29 A. 615.
2. (1875) 24 W. R. 298.
3. (1903) 30 I. A. 154, s. c. I. L. R. 30 C. 872.
4. (1903) I.L.R. 27 M. 143 (P. C.)

Narasimha Rau v. Gangaram. Chief Justice.

question of limitation was governed either by Article 49 or Article 36, and affirmed the Munsif's decree. The lower Courts have dealt with the case on the footing that the attached property was moveable property, and I deal with the case on the same footing. My view is that the appropriate Article is Article 29, since this is the only Article which refers specifically to wrongful seizure under legal process. This was the view taken by this Court in *Murugesa Mudaliar* v. *Jattaram Davi*.[1] I do not think this Article should be construed as not applicable where the plaintiff seeks only to recover the value of property seized or the sale proceeds if the property has been sold, and as limited to claims for consequential damages. This is obviously not the sense in which the word is used in Articles 30 and 31, and I do not see why it should be construed in this restricted sense in Article 29. If Article 29 applies, the law is express, and the time is one year from the date of the seizure. No doubt S. 283 of the Code makes provision for a special procedure whereby a claimant to property which has been seized in execution may establish his right, but I fail to see how the provisions of this section can have the effect of postponing the time when limitation begins to run, or suspending the time which has begun to run, when the Limitation Act makes express provision in the matter.

Further I can see no good ground for holding that time does not run so long as the property remains *in custodia legis*. The damage to the plaintiff is the seizure of his property. True, he may eventually succeed in showing the property is his, and in the meantime the property is safe, but he is none the less damaged by being deprived of the enjoyment of his own property. The measure of damages is, of course, a different matter. If he brings his suit after his property has been restored to him, and his suit is in time, he can of course only recover damages on the footing that he has not been permanently deprived of his property. If he has already recovered damages on the footing that he has been permanently deprived of his property, and it is afterwards determined that the property is his, or the plaintiff's suit is ultimately dismissed, a question may arise as to what order the Court ought to make with regard to the disposal of the attached property or the proceeds thereof if

1. (1900) I. L. R. 23 M. 621.

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Chief Justice.

it has been sold; but I do not think this is a question which can be taken into consideration in construing the plain language of an enactment.

In *Murugesa Mudaliar* v. *Jattaram Davi*,[1] where goods were attached and sold whilst a declaratory suit by a party who claimed to be the owner of the goods was pending, it was held that time began to run from the date of the attachment. If Article 29 does not apply, I think the appropriate Article is Article 49—see *Multanchand* v. *Bank of Madras*[2]—and that time would run from the date when the property was wrongfully taken. In this view also the suit would be time-barred. The case *Ramaswamy Ayyar* v. *Muthuswamy Ayyar*,[3] where property had been seized by a Magistrate, is, I think, distinguishable.

It was contended on behalf of the appellant that either Article 62 or Article 120 applies. As regards Article 62, it is not necessary for me to consider whether if there had been no specific Article, which, as it seems to me, in terms applies to the present case, the money received by the defendants in this case is money had and received to the plaintiff's use within the meaning of the Article. I think Article 29, which is specific in its terms, applies, and not the general provisions of Articles 62 or 120. As I read the judgment of *West* J. in *Jagjivan* v. *Gulam*[4] I think it supports my view.

As regards the 4th defendant who received a portion of the sale proceeds by way of rateable distribution, I do not think that as regards the question of limitation, any distinction can be drawn between his case and that of the other defendants, since his right to rateable distribution is dependant on the seizure which has been held to be wrongful as against the plaintiff.

I would dismiss the appeal with costs.

Sankaran Nair J.:—The suit was instituted on 1st June, 1903, to recover the value of the paddy crops belonging to the plaintiff, attached by the defendants 1, 2 and 3 before judgment in a suit brought by them against the 5th defendant, and sold on the 10th April 1900, to satisfy the decree obtained in that suit. The proceeds of the sale were distributed among the defendants on the 15th May, 1900, and it is accordingly argued before us that

1. (1900) I. L. R. 23 M. 621.
2. (1905) I. L. R. 29 M. 46.
3. (1906) I. L. R. 30, M. 12.
4. (1883) I. L. R. 8 B. 19.

Article 29 applies and the suit is barred as it was not brought within one year from the date of the attachment. The plaintiff presented a claim petition when the property was attached which was dismissed on the 8th March, 1900. He sued to declare his title on the 26th March, 1900, and he obtained his final decree declaring his title on the 7th February, 1903.

A person whose property is attached in a suit between third parteis is entitled under the Civil Procedure Code to apply to the Court which attached his property to release the same from attachment, and the attachment will be set aside and the property released if he proves his title. The property, if moveable, remains in the custody of the Court while under attachment, and it will be restored to him on proof of his title.

If he fails in his application, the Civil Procedure Code allows him to bring a suit to declare his title *within one year from the date of his order*, and if he obtains a decree in his favour, the Court which attached his property and in whose custody it continues to remain is bound to restore it to him on his application. If the property has been sold and the proceeds are in Court, it is bound to deliver to him such proceeds. The loss of the moveable property is not, therefore, in my opinion, a necessary consequence of the wrongful seizure by attachment. The right to sue even after one year from the date of the attachment implies that the property continued in the claimant even after the expiry of the period prescribed by Article 29. So long as the property remains in the custody of the Court he cannot be said to have lost it and is not therefore entitled to any compensation for its loss, and Article 29 of the Limitation Act does not, therefore, apply. It might be otherwise where the loss to the plaintiff is directly due to the seizure. A suit, for instance, for damages on account of the deprivation of the use of the goods, for instance, for the hire of furniture under attachment, would come within the Article. If Article 29 applies, the result will be curious. If the owner of the moveable property gets his compensation from the plaintiff who attached his crops before judgment, and that plaintiff's suit is dismissed, to whom is the Court to deliver the property? Not to the owner, who has got his compensation. Not to the defendant, as whose property it was attached, because it has been declared not to belong to him in the suit which awarded compensation. Not to

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the plaintiff who failed in his suit and never claimed it to be his property.

The opinion expressed in *Murugesa Mudaliar* v. *Jattaram Davy*,[1] that Article 29 applies to such a case is opposed to the opinion expressed on the same facts in *Murugesa Mudali* v. *Jattaram Davy*,[2] and both were *obiter dicta.* From the statement of facts by the Judges of the Small Causes Court it does not clearly appear whether after attachment the property continued in the custody of the Court or in the possession of the defendants.

Nor, in my opinion, does article 49 apply. The suit is not for any specific moveable property, nor have the defendants wrongfully taken, injured, or detained the property. The wrongful seizure was by the Court, though at the instance of defendants Nos. 1 to 3. If there was any wrongful taking or detention of any property it was only when the money was paid over to the defendants. The Article that applies is, therefore, either Article 62 or Article 120, and in either case the suit is not barred.

Mr. *Ramesam* contends that the plaintiff's cause of action arose when the wrong was inflicted on him. This may be so, but the wrong for which he now claims compensation is not the attachment but the payment to the defendants of the money which belongs to him.

Of the authorities cited the decision in *Lakshmi Priya Chowdharani* v. *Rama Kanta Saha*[3] supports my view. The case in *Jugjivan* v. *Gulam*[4] was strongly relied upon by the respondent's pleader. But a careful consideration of that judgment has satisfied me that it strongly supports my conclusion. Mr. Justice *West* points out that when the plaintiff wants to recover his property, the proper course to follow is the one I have already indicated. He adds: "Besides the recovery of the article, the owner may seek compensation for damage to it and for his loss of the use of it and *for such a suit Article 29 prescribes a term of one year.*" I agree. But he also holds that when the recovery of the article may become impossible or undesirable, the owner may seek compensation both for the thing itself and for the damage he has sustained through being deprived of

1. (1900) I. L. R. 23 M. 621.
2. (1899) I. L. R. 22 M. 478.
3. (1902) I. L. R. 30 C. 440.
4. (1883) I. L. R. 8 Bom. 19

the use. To such a suit then Article 29 would apply "as the double claim of compensation consists of elements of identical character ; these, though capable of separate existence, blend by contract in their subject into one." This reasoning will only apply when they blend into one by the plaintiff finding it impossible or undesirable to recover the property probably on account of its nature by reason of the seizure itself. It obviously cannot apply when the two claims blend into one after the expiry of the period prescribed by Article 29. At any rate, I do not think that the learned Judge had that case in view. The suit itself was apparently not brought within 3 years after payment to the defendants.

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Sankaran Nair J.

I am, therefore, of opinion that the plaintiff's claim is not barred, and would accordingly reverse the decrees of the Courts below and pass a decree in favour of the plaintiff with costs throughout.

BY COURT :—As there is some conflict in the authorities, we refer the appeal under S. 575 of the Code of Civil Procedure to a Bench of three Judges.

The case was again posted for hearing on the 18th August 1908, and the Court delivered the following

JUDGMENTS.—*The Chief Justice* :—I adhere to my former judgment.

Sankaran Nair J.:—I have nothing to add to my former judgment.

Pinhey J :—I have no doubt that the present suit is barred. It is urged that the wrong for which the appellant claims compensation is not the attachment of his paddy but the payment to the defendants of the money realized by its sale. If the seizure was not wrongful there was nothing wrongful in the payment. It is conceded that the seizure was wrongful. This is not a continuing wrong. Later manifestations of the original damage done and consequent upon the injury originally sustained do not give rise to a new cause of action. The cause of action, therefore, was the original seizure, and time began to run from that date. The Article of Schedule II of the Limitation Act that governs the case would appear to be either Article 29 or Article 49. The property seized was moveable. There was admittedly a wrongful seizure under legal process. The suit is for the value of

Narasimha Rau v. Gangaram. — Pinhey, J.

the property seized and for interest from date of decree, but not for other damage.

Whether Article 29 or Article 49 applies depends on the view taken of the scope and meaning of these two Articles. The learned Chief Justice takes the view that Article 29 is not restricted in its application to cases of consequential damage, but applies also to the case where the value of the property itself is sought to be recovered. He further holds that the distinction between Article 29 and Article 49 is that the former Article applies to a case of wrongful seizure made under *legal process*, whereas the latter applies when the wrongful seizure is made by a private person.

There is much to be said in support of this view, but it seems to me unnecessary now to decide which of the two Articles applies, for the suit is admittedly barred, whichever Article is applied, if the wrongful seizure is taken as the starting point for limitation and no allowance is made for the time spent in litigating the title under S. 283 Code of Civil Procedure.

As regards the time spent in litigating the title, I know of no provision of law under which this can be excluded. Nor do I see how the special period of limitation allowed by Article 11, Schedule II, of the Limitation Act for suits under S. 283, Code of Civil Procedure, can affect the limitation fixed by other Articles of the Limitation Act.

It seems to me the plaintiff in this case mistook his remedy. S. 283, Code of Civil Procedure, and Article 11 read together, afford the plaintiff one year from the 8th March 1900 to file a suit, but S. 283, Code of Civil Procedure, does not purport to lay down what the consequences will be in the event of success. The plaintiff contented himsef with filing a suit for declaration of title, but he omitted to get an injunction and so prevent the property, which was moveable, from being dealt with by the Court that had attached it. The property was sold soon after the institution of the suit and the sale proceeds distributed.

There was obviously no use in continuing a suit for cancellation of the order alone or for mere declaration of right to property which was no longer in the custody of the Court.

The plaintiff might have amended his plaint under S. 53, Code of Civil Procedure, and brought the 4th defendant on

record, but did not. In the result he obtained an infructuous decree and finds that his remedy as regards the property itself or its value is barred by specific articles of the Limitation Act which prescribe within what period suits for recovery of compensation must be filed. (Narasimha Rau v. Gangaram. Pinhey, J.)

I hold that the cause of action arose on the seizure of the property, that Article 29 or Article 49 of Schedule II, Limitation Act, governs the case, and that the suit is barred.

The appeal must be dismissed with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present :—Mr. Justice Munro and Mr. Justice Abdur Rahim.

Rathna Naidu .. Appellant*
v. (*Plaintiff*).
P. R. Aiyanachariar and others .. Respondents
(*Defendants*).

Hindu Law—Father's rights over property of divided son.

It is not open to a Hindu father to deal with the property of his divided son so as to bind the latter even though it be in respect of an antecedent debt. (Rathna Naidu v. Aiyanachariar)

Second Appeals from the decrees of the District Court of Trichinopoly in A. S. Nos. 202 and 255 of 1904 presented against the decrees of the Court of the District Munsif of Srirangam in O. S. Nos. 303 and 722 of 1902. (17 C.W.N. 102 = 16 C.L.J. 31)

The facts appear from the judgment.

S. Srinivasa Aiyangar and *N. R. K. Thathachari* for appellant.

S. Gopalaswami Aiyangar for respondents.

S. Srinivasa Aiyangar:—S. A. 1022 of 1905 is a suit for recovery of money by the sale of property mortgaged by the father of the second defendant by Exh. *F.* in which Rs. 500 out of the Rs. 800 were for debts antecedent to partition. The mortgage by the father (1st defendant) is after the partition and covers the lands which fell to the son's share. The lower Courts have held that the son's divided property could not be mortgaged by the father, but have given a decree against the father only for money. I submit that a father can mortgage the son's divided share also for a debt antecedent to the partition. All that the son can claim is to impeach the character of the debt.

* S. A. Nos. 1022, 1028 of 1905. 11th September 1890.

Rathna Naidu v. Aiyanachariar

The son, under the Hindu Law, is bound to pay all his father's debts to the extent of the family property in his hands, which are not illegal or immoral. It does not matter whether the son is divided or not at the time the mortgage is executed—see also S. 41, T. P. Act; *Nanomi Babusin* v. *Modhun Mohun*[1]; *Ramasami Nadan* v. *Ulaganatha Gounden*[2]; *Ramachandra* v. *Kondayya*;[3] *Minakshi Nayudu* v. *Immudi Kanaka Ramaya*[4]; *Nanna Brahmayya Setti* v. *Chidaraboyina*[5]; *Jajabhai* v. *Vijbhugandas.*[6]

S. Gopalaswami Aiyangar.—This is a new argument not raised in either of the Courts below, urging an alternative claim. This ground is not taken in the plaint or in the issues or at any time in the Courts below. The only ground taken was whether the release by which the son's guardian released his divided property in favour of the father was valid or not. It was found that as it was not for his benefit it was invalid and that, therefore, the father had no title to the property which he mortgaged. Even if this alternative claim be now allowed to be argued, I submit that the son's share is not liable—*Maharaj Singh* v. *Balwant Singh*[7]; *Krishnasami Konan* v. *Ramasami Ayyar*[8]; and S. A. 1615 of 1891 unreported. S. 41, Transfer of Property Act, has no application, for the mortgage here is not made by a guardian.

Srinivasa Aiyangar in reply.—*Maharaj Singh* v. *Balwant Singh*[7] is clearly distinguishable. *Krishnasami Konan* v. *Ramasami Aiyar*[8] is explained in *Ramachandra* v. *Kondayya*[3] as referring to a case where the son not being a party to the suit cannot be proceeded against in execution. The unreported case is similarly distinguishable.

The Court delivered the following

JUDGMENT :—In these cases the plaintiff appellant is the same person. Defendants Nos. 1 and 2 are also the same, the latter being the son of the former.

The suit to which second appeal No. 1022 of 1905 relates is to recover from the 1st defendant and by sale of the mortgaged

1. (1885) I. L. R. 13 C. 27 35 (P. C.).
2. (1898) I. L. R. 22 M. 49 F. B.
3. (1901) I. L. R. 24 M. 555.
4. (1888) I. L. R. 12 M.; 142 (P.C.)
5. (1902) I. L. R. 26 M. 214.
6. (1886) I. L. R. 11 B. 37.
7. (1906) I. L. R. 28 A. 518.
8. (1899) I. L. R. 22 M. 519.

property the sum of Rs. 1,034 being the principal and interest due on a mortgage deed executed to the plaintiffs by the 1st defendant in 1900. Rathna Naidu v. Aiyanacharlar

The suit to which second appeal No. 1023 of 1905 relates is to recover possession of certain lands sold to the plaintiff by the 1st defendant.

In the first suit the District Munsif gave the plaintiff a decree against the 1st defendant personally, but exonerated the property. The second suit was dismissed. The decrees were confirmed in appeal.

Prior to the mortgage and sale there was a partition between the 1st and 2nd defendants in which the properties now in suit fell to the share of the 2nd defendant. The plaintiff alleged that the 2nd defendant subsequently released his share in favour of the 1st defendant who thus became exclusively entitled to the property. Both the Courts below have found, however, that the release was not binding upon the 2nd defendant, and this finding of fact is binding upon us. The position then is, that the 1st defendant sold and mortgaged property to which he had no right but which belonged to the 2nd defendant. *Prima facie*, therefore, the decrees of the lower Courts are right.

It is, however, contended in second appeal No. 1022 of 1905 that the consideration for the mortgage consisted, to the extent of Rs. 500, of antecedent debts incurred by the 1st defendant prior to the partition, and in second appeal No. 1023 of 1905, that the whole consideration was similar antecedent debts of the 1st defendant and that to the extent of these debts the sale and mortgage are binding on the share of the 2nd defendant. It is sufficient answer to this contention to point out that no foundation was laid for it in the plaints. There was no plea by the 2nd defendant, that the debts were illegal or immoral, a plea which was open to him to raise if the plaintiff had asked for relief on the basis of the duty to pay his father's debts, and no issue was taken on the point. These cases are, therefore, distinguishable from the case of *Maharaj Singh* v. *Balwant Singh* [1] which has been quoted before us. Further we have not been referred to any authority for the proposition that it is open to a father to

1. (1906) I. L. R. 28 A. 508.

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deal with the property of his divided son so as to bind that son. On the other hand *Krishnasami Konan* v. *Rangasami Ayyar*[1] is authority for holding that where the estate is divided the father cannot sell what does not fall to him in the division. We, therefore, dismiss these second appeals with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.

Present:—Mr. Justice Boddam and Mr. Justice Munro.

Cherukuru Musaly and others .. Appellants*
v. (*Defendants* 1 *to* 8).
Cherukuru Lakshumayya and others .. Respondents
(*Plaintiffs*).

Musaly v. Lakshumayya

Limitation Act, Arts. 32, 120—Injunction—Suit for, as between co-owners.

A suit by one co-owner for an injunction restraining the other co-owners from obstructing a common way is governed by Art. 120 and not by Art. 32 of the Limitation Act.

Second Appeal from the decree of the District Court of Guntur in A. S. No. 2 of 1906 presented against the decree of the Court of the District Munsif of Guntur in O. S. No. 429 of 1904.

P. Nagabhushanam for appellants.

S. Srinivasa Aiyangar for respondents.

The Court delivered the following

JUDGMENT:—The principal question of law now raised was not raised in the Courts below. It is now contended that the case is governed by Art. 32 and not by Art. 120 of the Schedule to the Limitation Act relying on *Soman Gope* v. *Raghubir Ojha*,[2] and *Sharoop Dass Mondal* v. *Joggeshsur Roy Chowduri*.[3] These cases, however, are clearly distinguishable. As, in the present case, the parties are co-owners of the land in question and not landlords, we think Art. 120 of the Limitation Act applies and not Art. 32. It is next argued that a mandatory injunction should not have been granted.

Here, however, the plaintiffs objected and the defendants first commenced to obstruct the joint way and have continually been objecting since. Moreover, it is clear that unless the

* S. A. No. 116 of 1907. 1st April 1908.

1. (1899) I. L. R. 22 M. 519. 2. (1896) I. L. R. 24 C. 160.

3. (1899) I. L. R. 26 C. 564.

obstructions are removed the way which is common not only to the plaintiffs but to others cannot be used for the purposes for which it was set apart to the great injury and damage of all the co-owners except the defendants.

Musaly v. Lakshmayya

We think, therefore, that the decree is right, and we dismiss the appeal with costs.

IN THE HIGH COURT OF JUDICATURE AT MADRAS.*

Present:—Mr. Justice Munro and Mr. Justice Abdhur Rahim.

Devaguptapu Peda Satyanarayana, minor, by his father and guardian Appalarazu .. Appellant (*Plaintiff*)

v.

Gopalapati Sarasamma and others .. Respondents (*Defendants*).

Madras Act II of 1894, S. 13—Registration—Effect of—Inam,—Enfranchisement in favor of another.

Appalarazu v. Sarasamma.

The effect of registration under S. 13 of Madras Act II of 1894 is merely to declare that the person registered is entitled, on attaining majority or within three years thereafter, to be appointed to the office provided he is duly qualified; and it does not give the registered person any right to sue for the inam lands attached to the office and enfranchised in favor of another.

Second Appeal from the decree of the Temporary Subordinate Judge's Court of Vizagapatam in A. S. No. 21 of 1906 presented against the decree of the Court of the District Munsif of Yellamanchili in O. S. No. 300 of 1905.

B. Sitarama Rao for *D. Sriramulu* for appellant.
V. Ramesam for respondent.

The Court delivered the following.

JUDGMENT :—One Venkappa, deceased, was Kurnam of Koduru. He had two daughters, one the 1st defendant and, other the mother of the plaintiff. Venkappa died in 1901 and the plaintiff, who was then a minor, was registered as Venkappa's heir under S. 13 of Madras Act II of 1894. The lands which formed the emoluments of the Kurnam's office were in 1903 enfranchised in the name of the 1st defendant, the plaintiff being then still a minor and his mother being dead. The plaintiff now sues for

* S. A. No. 1449 of 1907. 11th September 1908.

Appalarazu v. Sarasamma.

the cancellation of the pattah issued in the name of the 1st defendant and for issue of pattah in his own name. He failed in both the Courts below. We think the plaintiff's suit was rightly dismissed. At the time of the enfranchisement of the 1st defendant the plaintiff was not Venkappa's heir in respect of any other property of his. The plaintiff's claim is based before us, not on the ground that he has actually been appointed Kurnam at the time of the enfranchisement, but on the ground that he had been registered as Venkappa's heir as above-mentioned. As was observed in *Venkata* v. *Rama*[1] the plaintiff, if he had been appointed to the office before the land was enfranchised, might have a foundation for his claim to the lands. But the question is whether mere registration under S. 13 of the Madras Act II of 1894 gives the plaintiff the right which he seeks to enforce. The effect of such registration is merely to declare that the person registered is entitled, on attaining majority, or within three years thereafter, to be appointed to the office, provided he is duly qualified. In the meantime the duties of the office are to be performed by some other qualified person. Till enfranchisement the inam, of course, continued to be attached to the office, but at the time of enfranchisement there was no good ground for passing over the 1st defendant and issuing pattah in the name of the plaintiff who was not the office-holder then and who might never be appointed to the office.

We, therefore, dismiss the second appeal with costs.

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1. (1884) I. L. R. 8 M. 249 at p. 263.

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The appellant was one of two sureties in a bond conditioned for the due administration by one Cowie of the estate of one Craster, who died in England in August 1898 leaving a will which was duly proved there in the following month of October. Part of the deceased's estate consisted of shares in the Bank of Bengal and other Indian assets. On July 29th 1902, Cowie obtained an order for the grant of letters of administration to himself as attorney for a fictitious person represented by him to be the only son and the sole next-of-kin of the deceased, who had, as he pretended, died intestate. The letters of administration were issued on the 15th of August 1902, on the production of a bond in the usual form executed by Cowie and two sureties, who received a small payment for their services, but were not themselves parties to the fraud or cognizant of it. By those means Cowie obtained possession of the bank shares, sold them in the market, and converted the proceeds to his own use. The fraud was subsequently discovered. The grant of administration in his favour was cancelled and in May 1904 letters of administration with a copy of the will annexed were granted to the

Administration—(*continued*).
Administrator-General of Bengal. The bond of the 15th August 1902 was then assigned to the Administrator-General. and he brought the present suit against Cowie and Cowie's sureties.

Held, that so long as the letters of administration granted to Cowie remained unrevoked, Cowie, though a rogue and impostor, was to all intents and purposes administrator and for his acts and defaults as administrator the appellant and his co-surety became and must remain responsible ; and that the decree under appeal confirming a decree of the first Court the result of which so far as regards the sureties, was that they were ordered to pay to the Administrator-General a sum equal to the amount of the proceeds of the Bank shares misappropriated by Cowie together with interest and costs, was perfectly right.

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Held:—That the plaintiff having got his primary relief, there was nothing for him to file a memo under S. 561, C.P.C., and that it was within the jurisdiction of the Appellate Court to modify the decree in the way it did. *Kulaikada Pillai* v. *Visranatha Pillai* (28 M. 219) distinguished.

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Assam Regulation—(*continued*).

giving compensation in exchange, it lies upon the Government to show that the facts of the case are such as to bring it within the operation of the Regulation. Their Lordships also held that they were entitled to go into a question of fact even though there be concurrent findings on it, if at every point in the process of the reasoning on the question considerations of law have to be regarded.

In this case though the evidence as to possession and enjoyment was insufficient to establish a title by adverse possession for sixty years, their Lordships relied upon it as proof of title, and, on the strength of that evidence, reversed the judgments of the Courts below.

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A benami conveyance is not intended to be an operative instrument.

Where a benami conveyance is executed in order to defraud creditors, if the fraud has not been effected, there is, nothing to prevent the executant from repudiating the entire transaction, revoking all authority of his confederate to carry out the fraudulent scheme and recovering possession of his property.

Taylor v. *Bowers* (19 B. D. 291); *Symes* v. *Hughes* (L. R. 9 Equity 475 at 479) *In re Great Berlin Steam Boat Co.* (25 Ch. D. 616) followed *Kearly* v. *Thompson* (24 Q.B. 742) explained.

To enable a fraudulent confederate to retain property transferred to him in order to effect a fraud the contemplated fraud must be effected ; then and then alone does the fraudulent grantor or giver lose the right to claim the aid of the law to recover the property he has parted with.

But where the fraudulent or illegal purpose has actually been effected by means of the colourable grant then the maxim applies—*In pari delicto potior est conditio possidentis.* The Court will help neither party and the estate will lie where it falls.

Where there is a benami transfer for the purpose of defeating creditors and the purpose is not carried out, the instrument is inoperative, and a suit by the executant of the deed for the recovery of possession of properties from the transferee is governed by Art. 144 and not by Art. 91 of the Limitation Act.

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Chhatrapat Singh Dugar v. *Maharaj Bahadur Singh*, P.C. 125 (Lord Macnaughten) 125

Bengal Tenancy Act, S. 188—*Suit by one of several co-sharer landlords for entire rent—Right to receive his own share separately—Contract express or implied—Other sharers made defendants.*

It is a general rule that a sharer whose co-sharers refuse to join him as plaintiffs can bring them into the suit as defendants and sue for the whole rent of the tenure.

An agreement either expressly proved or implied by the conduct of the parties may establish the right of one of several co-sharer landlords to sue separately for the shares of rent receivable by the separate shareholders, but such an agreement, either express or implied, merely affects the right to sue separately for rent, and in no other respect modifies the terms of the holding, *e. g.*, the right of a sharer to bring the tenure to sale for arrears of rent or the right of one sharer to sue, making his co-sharer defendants when they will not join as plaintiffs.

The filing of a suit is not a thing which the landlord is, under the Bengal Tenancy Act, required or authorized to do. It is an application to the Court for relief against an alleged grievance, which the plaintiff is entitled to submit under the general law, and S. 188 of the Bengal Tenancy Act does not preclude a suit for the aggregate rent of the tenure with the other sharers as defendants.

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The High Court has power to stay Criminal proceedings taken in consequence of an order under S. 476, Cr. P. C.

The power of general superintendence given by S. 15 of the Charter Act includes the power to point out to the Subordinate Courts, the inexpediency of trying a case when it is likely to interfere with the due course of justice. Their Lordships stayed the Criminal proceedings in a case taken in consequence of an order by a Civil Judge under S. 476, Cr. P. C for prosecution

Charter Act—(*continued*).

for forgery pending an appeal from a final decree of the Civil Court against the finding of forgery.

In re Jogiah 46

1. **C.P.C., S. 13—(S. 11 N.C.)**—*Estoppel by judgment—Fraud—Sale with intent to effect fraud—Claim in execution by purchaser—Decree in favour of purchaser—Subsequent suit by purchaser for possession—Defence that sale was sham.*

In execution of a decree against the father of the second defendant, plaintiff by his next friend laid claim to the suit property and obtained a decree declaring him to be the owner as purchaser from the second defendant. To that suit, the defendant was a party. The plaintiff now brought this suit for possession on the strength of the declaration so obtained. In the prior suit the Court found that the property was the self-acquisition and separate property of the defendant purchased by him after separation from his father.

Held per Curiam:—The decree operated *as res judicata* between the plaintiff and the defendant who were parties to the suit and it was not open to the defendant now to set up that the sale deed by him to the plaintiff was nominal and colourable with the intention of defrauding the creditors.

Per Abdur Rahim J.—It is a clear and well established principle of law that where the decree of a Court has been passed upholding a certain transaction between the parties to a suit neither the plaintiff nor the defendant will be allowed afterwards to say that the decree was the result of a collusive arrangement arrived at by them in order to carry out a scheme of fraud and that it should therefore be treated as a nullity and the state of things which existed previously to the passing of such decree be restored.

Where two persons have combined to defraud a third person and succeeded in their effort without obtaining the decree of a Court, the Court will not permit one of the parties to show that the transaction between him and the other party to fraud was not really what it purported to be and that it does not therefore bind them.

Kana Row v. *Nutramma* 576

Per *Benson* and *Wallis* J. J. :—(Chief Justice *dissentiente*)— A suit by the assignee of a mortgage against the mortgagor and his assignor (the mortgagee) for a mortgage-decree in the first instance against the mortgagor for the whole amount mentioned in the mortgage, and, in the alternative, for a money-decree against the assignor (mortgagee) in respect of the amount that may be proved to have been received by him subsequent to the assignment and a mortgage-decree in respect of the balance is not bad for misjoinder of defendants.

Per *Wallis* J. :—The words "in respect of the same matter" in S. 28 indicate that claims to relief might be joined in one suit against several defendants whether they constituted separate causes of action or not, so long as they are in respect of the same matter. The scope of S. 28 is wider than that of English rule 4, O. XVI, and English decisions under rule 4 are not applicable to S. 28, C.P.C.

C.P.C.—(*continued*).

Obiter :—English decisions on rule 1, O. XVI, are applicable to cases of joinder of plaintiffs under S. 26, C.P.C.

Aiyathurai Rauthan v. *Meera Rauthan* 238

2. ———S. 13 **"Heard and decided"**—*Reservation of right in decree. Held* that a decree which reserves to plaintiff the liberty of bringing a fresh suit in respect of the same matter cannot operate as *res judicata.*

Murugappa Asari v. *Santhiammal* 198

3.———*Res judicata on a question of law—Erroneous decision on a point of law*:—A decision come to on a mistake of law cannot operate as *res judicata* in subsequent proceedings not affecting the operation of the prior order.

Mangalathammal v. *Narayanasawmi Aiyar* (I.L. R. 30 M. 461).; *Ailamma* v. *Narayana Bhatta* (I.L.R. 30 M. 584) followed 548

Palaniappa Chettiar v. *Savari Naidoo.*

4. ———**Ss. 26 (O. 1 rr. 3, 4, N.C.)** 28, 46.—**Misjoinder of parties defendants**—*"In respect of the same matter"—Suit by assignor of mortgage against mortgagor and his own assignee for a mortgage decree against the mortgagor and in the alternative a personal decree against the assignee.*

5. ———**S. 28 (O. 1, rr. 3, 4 (b) N. C.) " Same Matter "**—*Joinder of Defendants—Guardian and Ward—Claim against guardian and alienees and others—No misjoinder.*—Plaintiff a minor, sued on attaining majority his guardian, the 2nd defendant, impleading defendants 1 and 3 to 8 as persons in possession of property wrongfully sold to some of them by the guardian, the 2nd defendant. *Held*:—That the suit was rightly framed and that there was no misjoinder.

Doraisami v. *Angammal* 265, 48

5 a———*See* C. P. C. (4)

6. ———**Ss. 28, 45 (O. II rr. 3, 6)—O. 1 rr. 3, 4,**—*Misjoinder of Causes of action—Suit for partition by co-sharers melvaram—Kudivaramdar's parties—Partition suit—Debtors—Parties*—A suit for partition by some of several co-sharers of the melvarem in which the Kudivaramdars also are impleaded with a view to the settlement of the relative rights of the Melvaramdars and the Kudivaramdars is bad for misjoinder of causes of action.

Obiter :—A suit for partition impleading the debtors of the family with a view to the determination of the nature and amounts of the debts so as to bind the debtors, is bad for misjoinder of causes of action.

Rama Krishna Iyer v. *Krishna Iyer* 65

6 a.———**S. 46** :—*See* C. P. C. (4).

7. ——— **S. 82 (O. V. rr. 19, 20 (1)** *Duty of Court on refusal by respondent to accept service*—Where the respondent refuses to accept service or cannot be found it is the duty of the Court, before proceeding with the appeal to declare that the notice had been duly served, and there is no sufficient service in law, where there has been no such declaration under S. 82, C.P.C.

Venkobachar v. *Raghavendrachar* ... ...

C.P.C.—(*continued*).

8. ———S. 108 (O. IX r. 13)—*Scope of—"Exparte decree"—Setting aside on an application of one of several defendants on sufficient cause being shown, effect of.*

Per Abdur Rahim J. :—In setting aside an *exparte* decree on the application of one of several defendants, the Court has no jurisdiction to set aside the decree against defendants other than those who have shown sufficient cause except in so far as the decree is one and indivisible

Per *Munro* J. :—The object of S. 108 C.P.C., is that a successful applicant should be put in exactly the same position as if no decree had been passed in the suit and the decree must, therefore, be set aside only so far as it is necessary to achieve this object, and no further. The decree in the case was against three defendants personally and the Devasom property. The third defendant applied to set aside the *ex parte* decree passed against him.

Held.—per *Curiam*:—That the Court had no jurisdiction to set aside the personal decree against defendants 1 and 2 and that the decree should have been set aside only in so far as it affected the third defendant and the Devasom property, it being competent to the third defendant to attack the decree in so far as it made the Devasom property liable.

Panji Achan v. *Marutha Veera Kavundan* 543

9. ———Ss. 157, 158—*" Or make such other order as it thinks fit "—Pleader appearing and asking for adjournment—Refusal to adjourn—Pleader abstaining from the conduct of the case—Whether exparte.* The latter part of S. 157, " or make such other order as it thinks fit" has no application to a case where the Court at once proceeds to trial and judgment.

The mere fact of a Pleader appearing for a party and applying for adjournment does not preclude the conclusion that the party, nevertheless, did not appear within the meaning of S. 157 or Ch VII. C.P.C. *Held* also that where the pleader who appeared for a party and asked for an adjournment of the case, on the Court's refusal to adjourn, altogether abstained from taking any part in the examination of the witnesses or in the argument of the case, the party whom the pleader represented "failed to appear" within the meaning of S. 157, C.P.C.

In cases where, on the Court refusing to adjourn a case, a pleader says that he has no instructions, it would be well explicitly to ascertain whether the pleader severs his connection with the case.

Ramanuja Reddiar v. *Rangasawmy Aiyangar* 51

10. ———S. 156—(O. XVIII, r. 1,) *Conditional order of adjournment —Decree on failure to pay costs, bad.*

The Court has no jurisdiction to pass an order of adjournment conditional on payment of costs so as to enable it to pass a decree in favor of the party

C.P.C :—*(continued).*

other than the one applying for adjournment in default of payment of those costs.

Mustan Rowthar v. Natharsa Rowthar. 541

11 ———157, 158 :—*See* C. P. C. (9).

12. ——— Ss. 230, 257 A.—*Order sanctioning a compromise not a new decree or order directing payment of money—C.P.C., S. 13—'Res judicata' on question of law—Erroneous decision on a point of law.*

An order sanctioning a compromise under S. 257 A, C.P.C. is neither a new decree nor an order for the payment of money within the meaning of S. 230, C P.C.

Palaniappa Chettiar v. *Savari Naidoo* 548

13. ———S. 234—(S. 50 N.C.) *Hindu Law—Decree debt—Sons brought on record as representatives of deceased father, pending suit—Decree, form of.*

Where the sons of a Hindu father are brought on the record in a pending suit against the father as his legal representatives, the decree to be passed as against them should only be in their representative capacity, that the amount of the decree should be recovered from them only from the estate of the deceased father in their hands.

Narayanasawmi Naick v. *Seshama Raju* 36

14. ———Ss. 244, (S. 47 N.C.), 278, 283—(O. XXI. r. 63.)—*Applicability of S. 244—Party claiming attached property in his character as trustee—Appeal—Wakf—Decree directing sale of wakf property—Validity.*

S. 244 has no application to a case where the judgment-debtor or his representative asserts in execution that he holds the property attached in trust for some third person or body of persons or a religious charity or institution. The claim must be investigated under, Ss. 278—283, C.P.C. and the order passed therein cannot be challenged by an appeal but must form the subject of a separate suit.

A decree directing the sale of wakf property may in certain circumstances be perfectly valid.

Budruddin Sahib v. *Abdul Rahim* 21

15. ———S. 257 A :—*vide* C. P. C. (12).

16. ———S. 258—(O. XXI. r. 22). Adjustment, in part, of decree—*Validity, when not certified.*

Where, after decree, an agreement is made discharging some of the defendants, the agreement is clearly an adjustment, in part, of the decree within the meaning of S. 258, C.P.C, and could not be set up in bar of execution, unless certified.

Muhamad Khan Bahadur v. *Muhamad Munawar Sahib* 542

17. ———S. 266—(S. 60 N.C.))—*Right of residence of Hindu widow in family house not liable to be attached and sold in execution of a decree against her.*

The right of a Hindu widow to reside in the husband's family house is a right personal to the widow and is not liable to be attached and sold in execution of a decree against her.

Salakshi v. *Lakshmayee*. 571

18. ———Ss. 281 and 283 (O. XXI. rr. 61 and 63)—*Res judicata, when—Not when judgment-debtor no party to proceedings.* An order passed under S. 281 C.P.C. is not conclusive against the judgment debtor unless he is a party to the proceedings in which the order was passed. An order under S. 281 C.P.C. cannot be taken advantage of by a person who was not a party to the proceedings.

Narasimaham v. *Sitharama Murthi.* 6

19. ———S. 283 (O. XXI. r. 63).—*Suit for value of property attached and sold wrongfully. See* Limitation Act, Art. 29, ... 590

20. ———Ss. 287, (O. XXI, r. 66) 311 (O. XXI, r. 90) 622 (S. 115 N.C.)—*Order, Construction of—Determination of section under which order is passed—Order passed without jurisdiction—Revision—Conversion of appeal into revision—Jurisdiction of successor in office to modify predecessor's order—Mortgage decree, form of—Sale by an undivided sharer bad.*

The fact that a Court by an order purporting to be passed under one section does something which it is not empowered by the section to do, will not make it an order under some other section. An order purporting to be passed under s. 287, C. P. C., but without jurisdiction, cannot on that ground, be deemed to have been passed under some other section and consequently appealable. A Judicial order not warranted by the section is open to revision by the High Court under s. 622, C. P. C.

A mortgagee is not entitled to divide his security into undivided shares and say that he will sell one-third of it for the whole debt, and if that is not enough, another third, and so on, though it is open to the Court to sell a specific portion of the property first, and then to proceed to sell the other portions.

A Court has no jurisdiction to modify an order passed by the predecessor in office of the presiding judge.

Krishnasawmier v. *Swaminadhier* 568

21 ———S. 295, (S. 73 N.C.) **Rateable distribution—"Against the same judgment-debtor"**—*Application for rateable distribution by attaching creditor of decree-holder.*

An application for rateable distribution by an attaching creditor of the judgment-creditor in a suit does not fall within S. 295, C. P. C.

Ellusah v. *Rangayyan* 562

22. ———S. 317—(S. 66 N. C.)—**No bar to suit against assignee from certified purchaser.**

C. P. C.—(*continued*).

S. 317 C. P. C., is no bar to a suit against an assignee from the certified purchaser.

Piramanayagam Pillai v. *Alwar Naicker* ; 21 M. 7 followed ... 803

23. ——S. 351—Insolvency, declaration of—Unfair preference—"*Act of bad faith*"—"*payment*"

Assignments of actionable claims are "dispositions of property" within the meaning of S. 351, C. P. C.

If a man on the eve of bankruptcy makes a payment to a particular creditor, the presumption immediately arises that he makes that payment with the dominant view of giving a preference to that creditor over his other creditors. There is no need for any evidence that the view was expressed in so many words by the bankrupt. It is a presumption which would arise from the transaction. It is sufficient to constitute an unfair preference if the preference is the substantial, effectual or dominant view of the debtor, though not the sole view.

A preference might be an "unfair preference" even though the payment might never have been made but for pressure, if it was also the fact that the payment would never have been made but for the desire to prefer in the sense that the desire was the dominant view of the debtor.

Held also in the circumstances of the case there was no unfair preference.

Angappa Chetty v. *Nanjappa Row* 389

[**Ss. 344—360 A**—have been repealed by the Provincial Insolvency Act].

24. ———S. 380, para 2—[O. XXV rr. (1), 3)] Security for costs—*Minor plaintiff—Practice.*

The words "such plaintiff" in the 2nd paragraph of S. 380, C. P. C., cannot be construed as applying to an infant plaintiff's next friend.

In the case of infant plaintiffs unless the circumstances are exceptional, they cannot be required to give security for costs.

Mani Bai v. *Lodd Govind Doss* 155

25. ———S. 396—(O. XXVI rr. 13, 14). Partition Decree—*Final decree—No application necessary—Court competent to act 'suo motu'—Partition by metes and bounds—Lands not paying revenue to Government.*

A suit for partition of lands not paying revenue to Government is to be considered pending on the file of the Court until there has been an actual division by metes and bounds under S. 396, C. P. C., and a final decree as contemplated by S. 396 is passed. The court is competent to pass the final decree for partition under S. 396, C. P.C., *suo motu* without an application by the parties for the purpose.

Appadu v. *Vencata Ranga Rau* 23

26. ———Ss. 483, 491 (S. 95 N. C.) S. 561 (O XLI. r 22)—*General damages in suit for compensation for wrongful attachment before judgment, awardable—Memorandum of objection not moved—Jurisdiction to dismiss the Memorandum with costs.*

C. P. C.—(*continued*).

General damages are recoverable in a suit for compensation for wrongful attachment before judgment.

Kumaraswami Pillai v. *Udayarnadan* ... ... 4[illegible]0

27. ———**Ss. 492, 493, 622**—(O. **XXXIX, rr. 1, 2**)—*Injunction—Trespass to property—Defendant in possession and plaintiff out of possession—Jurisdiction—Revision.*

S. 493, C. P. C., has no application when the defendant is in possession and the plaintiff out of possession, and a Court will be acting without jurisdiction if it grants an injunction in favour of plaintiff out of possession of the property in dispute.

S. 492, C. P. C., has no application when the case is not such a one as is described in the section, *viz.*, waste, removal, etc.

Subramania Aiyer v. *Vengu Iyer* 302

28. ———**S. 503** — (**O. XL, r. 1 to 3**) — *Accounts — Receiver appointed by High Court to furnish accounts — Jurisdiction of—Subordinate Court, to call upon.*

A Subordinate Court has no jurisdiction to call upon a receiver appointed by a High Court pending an appeal before it to furnish accounts or to make any order or give any direction as supplementary to those given by the High Court without authority given by the High Court.

Janaki Ammal v. *Narayanaswami* 589

29. ———**Ss. 506, 522—Appeal from award**—*Objections—Alleged misconduct of the arbitrator—Dismissal of Objections—Decree in accordance with the award—Incompetency of appeal from such decree.*

No appeal lies against a decree passed in terms of the award made on a reference to an arbitration under S. 506, C. P. C., on the ground of misconduct on the part of the arbitrator, except in so far as the decree is in excess of or not in accordance with, the award.

Objections such as those filed by appellants in the case are more or less frivolous and are not misconduct within the meaning of that expression in the chapter on Arbitration in the Civil Procedure Code.

Hansraj v. *Sundar Lal and Dwarka Das*; P. C. 266

30. ———**S. 520** :—*See* C. P. C. (32).

31. ———**Ss. 521, 522**—*Award set aside—Appeal—Appellate Court's jurisdiction to go into the question of the propriety of the order of the first Court setting aside the award.*

Where a Court sets aside an award and gives a decree on the merits and an appeal is preferred therefrom, the Appellate Court has jurisdiction to enquire into and decide as to the propriety or otherwise of the decision of the first Court setting aside an award.

Achutayya v. *Thimmayya* 228

32. ———**Ss. 522, 520**—*Decree in accordance with revised award—No appeal on the ground that prior remittal was wrong, maintainable.*

The provisions of S. 522, C. P. C., as to appeals from decree on awards should be strictly construed. No appeal lies from a decree passed in accordance with an award revised after remittal of a prior award under S. 520,

C. P. C.—(continued)

C. P. C., on the ground that the remittal order was erroneous. *Semble* :—No appeal lies against decrees passed in accordance with awards on the ground that an order under S. 520, C. P. C., was either improperly made or improperly refused.

Subbiah Iyer v. *Subramania Iyer* 485

33. ———— **Ss. 544 (O. XLI, r. 4) 583, (S. 144 (1)) 111 (O. VIII, r. 6)**—*Set off in restitution—Equitable relief—Accounts, taking of—"He who seeks equity must do equity."*

Defendant took a lease from one Z in 1882. Plaintiff took another lease from Z's successor in 1890. The plaintiff sued the defendant and his lessor's then representative for a declaration that the lease to defendant was invalid and for possession. Plaintiff obtained a decree for possession on condition of his paying a certain amount as compensation to the defendant. The defendant delivered possession on receipt of the compensation amount. The representative of the lessor appealed from the decree making the defendant a party. The decrees of the lower courts were upset by the High Court in August 1897.

Held, that under S. 544, C. P. C., the reversal of the decree by the High Court enured to the benefit of the defendant; also that the defendant was entitled to demand possession of the lands from the plaintiff by way of restitution; that the refunding of compensation amount by the defendant was not a condition precedent to his obtaining relief by way of restitution and that the defendant was entitled to ask that the amount may be adjusted by setting off mesne profits, which the plaintiff has wrongfully received against the compensation money, as on the date of the decree of the High Court.

Held, that it was not equitable that the defendant should be permitted in effect to postpone applying for restitution until mesne profits had amounted to a sufficient sum to wipe off the amount of the compensation money.

Madhavan v. *Valia Nambidi*. 39

34. ———— **S. 559—(O. XLI, r. 20)**—*"Is interested in the result of the appeal"—Parties, joinder of, in appeal.*

The words "interested in the result of the appeal" in S. 559, C. P. C., have been inserted to protect parties to the suit, who had not been made respondents in the appeal, from being prejudiced by modifications made behind their backs in the decree under appeal. The party whom it is sought to bring on record is required to be interested in the result of the appeal *before* he is so brought on record.

When a defendant has been exonerated and there is no appeal against so much of the decree as exonerates him, no decree can be passed against him in an appeal by any other party to the suit as he is no party to such appeal, and he cannot be said to be interested in the result of such appeal by another party unless the decree sought to be obtained against the respondent in the appeal

would have the effect of prejudicing him in some way or other ; and, consequently, the Appellate Court cannot make such a person a party to the appeal when the appellant judgment-debtor had impleaded only the decree-holder as party to the appeal.

Subramanian Chetty v. *Veerabhadran Chetty* 452

35. ———S. 561 (O. XLI, r. 22)—*Costs—Memorandum of objections not moved—Jurisdiction to dismiss the Memorandum with costs.*

Courts have jurisdiction to dismiss a memorandum of objections not stamped, and therefore not moved, and to dismiss it with costs also.

Kumarasawmi Pillai v. *Udayarnadhan* 490

36. ———Ss. 561, 590—*Memorandum of objections in appeals from orders.*

A memorandum of objections will lie in appeals from orders.

Sellammal v. *Velappa Naick* 157

37 ———S. 574 (O. XLI, r. 31)—**Judgment—Appellate.**—*Not in accordance with the Section—Appeal—Practice—Procedure.*

Where there has been a failure by the Appellate Court to comply with the requirements of S. 574, C. P. C., the proper form of the order to be made by the second appellate Court is to set aside the decree and remand the case to the first appellate Court for disposal according to law. If the judge of the first appellate Court happens to be the same individual who heard the appeal originally, he need rehear the appeal, only if he is of opinion that he cannot properly dispose of it without a rehearing; and where he is not the person who originally heard the appeal, he should always rehear it.

Saravana Pillai v. *Sesha Reddi* 34

37. A.———S. 590 *See* C. P. C. (36).

38. ———S. 622—(S. 115 N. C.)—*Revision—Practice*—The High Court will not, unless it be in a very special case, interfere under S. 622, C. P. C., when the party aggrieved has a remedy elsewhere.

Copa Angelis v. *G. D'Angelis* 566

39. ———S. 622, (S. 115 N. C.)—*Applicability to Presidency Small Cause Courts—Presidency Small Cause Courts Act, S. 69—Construction of document—Difference of opinion—Reference—S. 622, C. P. C., applicable to cases decided by the Presidency Small Cause Courts.*—Where upon an application to the Presidency Small Causes Court for a new trial, the judges without formally ordering it heard the whole case and differed on the question of construction of a document (*i.e.*, as to whether a condition formed an integral part of the contract) affecting the merits of the case, *held* that they were bound to refer the question to the High Court and that their judgment was liable to be set aside under S. 622, C. P. C., on that ground.

Rangiah Naidu v. *Rangiah* 480

40. ———S. 622—**Erroneous decision on a question of law**—*Revision.*—The decision of a court that an award was not bad on the ground that the arbitrator had drafted the plaint for one of the parties, the other party not having been aware of the same until after the award, though perhaps erroneous, is not liable to be set aside in revision under S. 622, C.P.C.

Subramania v. *Munusami* 249

Compromise of a doubtful claim—*When to be set aside.*—The act that the right is on the side of one party is not sufficient for the party to set aside a compromise entered into by him on the supposition of a doubtful right.

Olati Pulliah Chetty v. *Varadarajulu Chetti*... 469

Consideration—*Whether stranger can question.*—The question of an assignment being unfair and unconscionable is purely a question between the assignor and assignee. A third party who is sued by the assignee on the title derived from the assignment cannot raise the issue of the unfairness or unconscionableness of the assignment.

Dayal Singh v. *Dayal Sahu* 100

1. **Contract Act, S. 23—Immoral Contract**—*Loan for payment to a dancing girl.*—If a creditor advances a loan to the borrower, for and with knowledge of its being applied for an immoral purpose, the contract would be opposed to morality and public policy, and a suit will not lie for the recovery of the loan.

It is immoral for a Hindu to cohabit with a dancing girl, and payments made to a dancing girl with a view to the continuation of the cohabitation are immoral and opposed to public policy ; and loans made to enable a defendant to make such payments would be advances for an immoral purpose and cannot be recovered back.

Pannichand v. *Nanoo Sankar Tawker* 456

2. ———**S. 23—" Immoral or opposed to public policy."**—*Bride price—Contract to pay—Hindu Law—Marriage — Asura form.*—A contract to make a payment to a father in consideration of his giving his daughter in marriage is immoral and opposed to public policy within the meaning of S. 23 of the Indian Contract Act.

Obiter :—Though the Asura form of marriage when actually performed may be recognized as valid, it does not follow that an agreement for such marriage would be legally enforceable.

Visvanathan v. *Saminathan* (I. L. R. 13 M. 83) overruled, *Vythinathan* v. *Gangaraju* (I.L.R. 17 M. 9) referred to ; *Dholidas* v. *Fulchand* (I. L. R. 22 B. 658), followed.

Venkata Kristnayya v. *Lakshmi Narayana* 403

3. ———**S. 23—Carrier's contract exempting from liability for negligence**—*Public policy, not opposed to.*

Per Chief Justice and Wallis J. (Sankaran Nair J. *contra*) :—Contracts exempting a carrier from liability for negligence of his servants are not void in India as opposed to public policy.

Sheik Mahomed Ravother v. *B.I.S.N. Co.* 497

4. ———**S. 151—Contract between carrier and consignor exempting from liability**—*See* Maritime Law—Bill of Lading.

5. ———**S. 221—Lien of Agent**—*Company — Winding up of—Effect of winding up of, on lien—Companies Act, S. 149.*

Contract Act.—(*continued*). M. L. J. PAGE.

S. 149 of the Companies Act does not authorise a Court to deprive a secured creditor of possession of his security ; and consequently if an agent of the Company is entitled to remain in possession by virtue of a lien under S. 221 of the Contract Act, the making of the winding up order would not affect his right to remain in possession and continue to make the necessary disbursements. Disbursements made between the date of the winding up order and that of the handing over of possession stand on the same footing as the disbursements made prior to the winding up order, and the agent is entitled to a lien in respect of both.

Held also that on a construction of the agreement between the agent and the Company, there was nothing in it to exclude the operation of S. 221 of the Contract Act.

Chidambaram Chettiar v. *Clark* 251

Conversion of appeal into revision—*See* C.P.C., S. 287 ... 502

Corporation—*Member of the Corporation—Common Law right of member to inspect books of the Corporation—Presidency Banks Act (XI of 1876)—Bank of Bombay—Shareholder—Suit by shareholder against the Bank to enforce inspection of the register of shareholders—Allegation of irregularities in the management of the Bank, in the election of its Board of Directors, and in the advancing of money to Directors—Object of inspection, to communicate with other shareholders—Nature of the suit—Issue of the Writ of Mandamus, principles of, regulating the right under Statute—Common Law right—Absolute right of inspection—Qualified or limited right of inspection.*

At Common Law members of a Corporation have no absolute right, whenever they think fit, to inspect all papers belonging to the aggregate body. The privilege of inspection is confined to cases where the member of a Corporation has in view some definite right or object of his own, and to those documents which would tend to illustrate such right or object.

Taylor on Evidence Vol. 2, para 1495, approved and followed.

On the application of a member, the King's Bench Division will, in general, grant a rule for a *limited* inspection of the documents of the Corporation, if it be shown that such inspection is requisite with reference either to an action then instituted or at least to some specific dispute or question pending in which the applicant is interested ; but, even in this case, the inspection will be granted to such an extent only as may be necessary for the particular occasion. The respondent was a holder of one share in the Bank of Bombay. He claimed a right to inspect the register of the shareholders of the Bank, and to be supplied with a list of such shareholders, as absolute and unqualified as is conferred on the shareholders of Joint Stock Companies in England by S. 32 of the Companies Act, 1862, or in India by S. 31 of the Indian Companies Act, 1866, and S. 55 of the Indian Companies Act, 1882.

The appellants refused to recognize that absolute and unqualified right, or to comply with the claim based upon it, but in their letter which conveyed that refusal, they informed the respondent that they would be pleased to

Corporation—(*continued*).

furnish him with the list he asked for if he would satisfy them that he required it for use in his own interests as a shareholder. In the statement of claim the respondent, for the first time, endeavoured explicitly to base his right and title to inspect, copy, and take extracts from, the register on some definite matters in which he himself was interested. He alleged therein that he had observed irregularities in the management of the Bank, in the election of its Board of Directors, in the advancing of large sums of money to its Directors, and in other matters, and that he desired an inspection of the register to enable him to communicate with the other shareholders, and, if possible, obtain their assent to certain resolutions for the better management of the affairs of the Bank and the removal of some of the Directors, which he intended to propose at the next general meeting of the shareholders.

Held, that the suit was in truth in its nature, though not in its form, somewhat of the character of an application for a Writ of *Mandamus*, and the principles regulating the issue of that prerogative writ should apply to a great extent to the granting of the relief prayed for in a suit like the present. *Mandamus* would not be allowed to issue unless the applicant showed clearly that he had the specific legal right to enforce which he asked for the interference of the Court, that he had claimed to exercise that right and none other, and that his claim had been refused.

A Writ of Mandamus for inspection of registers would not be issued if the object of the applicant is merely to see "if by possibility the Company's affairs may be better administered than he thinks they are" and not any definite right or object of special interest to the applicant as distinguished from that of his fellow members.

Held also, that there was no statute conferring on the members of the Bank of Bombay a right to inspect, copy, or take extracts from, the register of its shareholders or any other document belonging to it, and the only right the respondent could have, therefore, against the Bank in reference to such matters, was that which at Common Law belonged to every member of a Corporation.

Held further, that the respondent was not in law entitled to the extensive right to which the decree of the Court of Appeal declared him to be entitled, and that the limited and qulified right contended for at the trial was never put forward, or insisted on, before action brought, or any claim based upon it ever refused.

The Bank of Bombay v. *Suleman Somji* P.C. (LORD ATKINSON) ... 355

Costs—Memo. of objections not moved—*Jurisdiction of Court to award*—*See* C. P. C., S. 561 490

Court of Wards—Rules—*Claim made within time—Reference by Decree Collector—Exclusion of time—Limitation Act, Ss. 4 and 14.*—Where there were both a Regulation Collector and a Decree Collector and a claim was preferred to the Regulation Collector in respect of a debt before the recovery of it was barred by limitation, the claim is not liable to be dismissed as barred on the ground that the reference by the Decree Collector to the Civil Court was

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Court of Wards—(*continued*).
made after the expiry of the limitation period in consequence of the delay that happened in the disposal of the claim by the Regulation Collector. The reference by the Decree Collector to the Court is not to be regarded as the institution of a suit by the claimant, and S. 4 of the limitation Act has no application to it.

The question that could properly be referred is whether the claim was legally enforceable when it was made to the Regulation-Collector and not whether it was legally recoverable on some subsequent date arbitarily fixed by the Regulation-Collector.

Obiter :—The case will be different if there was no Decree-Collector at all, but there was only the Regulation-Collector, when the suit will have to be filed before it is barred.

A Regulation-Collector is not a Court "which from defect of jurisdiction was *unable* to entertain the claim" within the meaning S. 14 of the Limitation Act, and S. 14 will not avail for the exclusion of the time taken before the Regulation-Collector.

Collector of Uthumalai v. *Subbier* 581

1. **Co-tenancy—Suit by one of several Co-sharer landlords** *for entire rent impleading other sharers as defendants* :—*See* Bengal Tenancy Act, S. 188 43

1. **Cr. P.C., Ss. 131, 136**—*Penal Code, S 188*—"*Shall be liable to the penalty*"—*Failure to comply or to object*—A person against whom an order under S. 133, Cr. P.C. is passed, if he neglects to take any steps whatever in respect of such order, either by way of compliance or objection in the manner provided by law, renders himself liable to proceedings under S. 188, I.P.C., and it is not necessary that a further notice should be given to him as provided for in S. 140 requiring him to perform the act directed by the order within a fresh period of time.

Guruviah, In re 216

2. ———**S. 145—applicability**, *to disputes as to possession between manager and member of a Joint Hindu family.*—The possession the Managar of of a Joint Hindu family as against another member can be protected by proceedings under S. 145, Cr. P.C.

Kesavarayudu v. *Chalapatirayudu* 348

3. ———**S. 195 (a)**—*Penal Code, S. 182—Village Magistrate not subordinate to Sub-Magistrate—"Subordinate Officer" meaning of.*—A Village Magistrate is not an officer subordinate to a Sub-Magistrate within the meaning of S. 195, Cr. P. C. The subordination of one officer to another should arise either by express enactment or from the fact that both public servants belong to the same department, one being supperior in rank to the other

Narasimhayya v. *Venkatasami*... 584

4. ———**S. 259**—*Jurisdiction of Magistrate to re-entertain complaint on the same facts after a discharge*—A Magistrae who has discharged an accused person under S. 259, Cr. P.C., is competent to re-entertain a fresh complaint on the same facts. *Chinnathambi* v. *Salla Gurusawmi Chetti* (I.L.R. 28 M. 310) *and Emperor* v. *Chinna Kaliappa Goundan* (I.L.R. 29 M. 126) followed.

In re Rudra Gowd 561

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Cr. PC.,—(*continued*).

5. ———S. 297—*Charge to Jury—Misdirection—Omission to tell the jury the effect of Ss. 25, 26—Evidence Act—Confessions, directions about.*—It is a misdirection to tell the Jury generally that confessions to the police if followed by the production of stolen property is admissible, without more; omission to point out that such confessions are only admissible in so far as they relate distinctly to the fact thereby discovered vitiates the trial. Where there are more than one accused, the jury should be warned to take, and deal with the case of each accused separately, and a confession of one involving himself alone cannot be used against the others.

Acohabba Beori v. *The King-Emperor* 250

6. ———S. 297—*Charge to Jury—Misdirection—Omission to refer to the plea of accused or to the evidence bearing thereon.*

Omission by the Judge to refer to the plea of *alibi* of the accused and to the evidence bearing on the plea in his charge to the Jury is a misdirection, and the accused are entitled to be retried.

In re, Gangi Reddi Buchanna 541

7. ———Ss. 297, 288—*Misdirection to the Jury—Evidence Act, Ss. 27, 30—Statement of co-accused leading to the discovery of relevant fact, when evidence—Statement of a witness before investigating Magistrate—No evidence.*

The question whether a person was in police custody while making a confession is one for the Judge to decide ; and the omission of the Judge to state to the Jury his finding on the point that a person was in police custody is not a misdirection. Under Ss. 27 and 30 of the Evidence Act, the most that could be taken into consideration in the statement of an accused against another would be so much of the information amounting to a confession as was the immediate cause of the discovery of some relevant fact against the person making the statement.

A statement made by a witness to a Police Inspector or to an investigating Magistrate is no evidence against an accused, even though the statement before the investigating Magistrate is made in the presence of the accused; and a direction to the jury that such evidence is strong evidence against the accused is a serious misdirection.

Sankappa Rai, In re 66

8. ———S. 367—*Judgment—"Shall be dated and signed by the presiding officer"—Judgment dated and signed by successor—No irregularity.*

Under S. 367. Cr. P.C., it is not necessary that the presiding officer of the Court who wrote the judgment should be the same person as the presiding officer who is required to date, sign and pronounce it.

Sankara Pillai, In re 197

9. ———S. 407—*Withdrawal of appeal—Part heard appeal—Withdrawal—Omission to examine witness summoned by Court from which the appeal was withdrawn.*

It is competent to a District Magistrate to withdraw part heard appeals from the file of a First Class Magistrate subordinate to him under S. 407, Cr. P.C.

Cr. P.C.,—(*continued*).

The Court to which an appeal is transferred for disposal is not bound by any opinion as to the necessity for taking further evidence formed by the Court from which the appeal was withdrawn.

Alagu Ambalan In re 489

10. ——— **Ss. 423, 435, 437, 439—District Magistrate's powers of revision**—*Misappreciation of evidence by Sub-Magistrate and discharge—District Magistrate, functions of.*

Where a Court, competent to decide whether the accused is guilty or not holds that he is not guilty on a consideration of the evidence adduced by the prosecution, that finding should, if at all, be set aside only by a Court competent to set aside such a finding of fact, *i.e.*, by the High Court under S. 439, Cr. P. C. read with S. 423. The District Magistrate is not entitled to come to a conclusion on the evidence and hold that a *prima facie* case has been made out and order "further inquiry" by another Magistrate. The proper course for the District Magistrate to take is to refer the matter to the High Court. It may be different when he exercises his powers for reasons other than mere misappreciation of evidence.

The proper function of a District Magistrate is criticism. He ought to point out to the Subordinate Magistrate the reasons which may have led him to an incorrect conclusion, *i.e.* reasons which have been held to justify the High Court in interfering with findings of fact, to enable the Magistrate to come to a right conclusion and not dictate to him the decision to be pronounced.

Lakshiminarasappaya v. Venkatappah 57

11. ——— **S. 488**—"*May*"—*Discretion.*

The use of the word "may" in S. 488, Cr. P.C., shows that a Magistrate has a discretion to decide in what cases the award of maintenance may properly be made, though the discretion must be exercised judicially and reasonably and not capriciously.

Held also that the refusal to make an order for maintenance against the husband on the ground of the woman living in adultery with a low-caste man, was a proper exercise of the discretion vested in the Magistrate.

Ponnayee v. Periya Moopan 150

Criminal Trial—*Waiver by accused of provisions regulating trial —No cure :—See Waiver.* 330

Damages—Proof—*Obstruction of water supply to ryotwari landholder by another land-holder—Proof, when unnecessary—Onus :—See Tort.* ... 178

Darkhast rules (Madras)—*Dharkhast of land within port limits —Grant without consulting Presidency Port Officer—Mere irregularity—Grant not set aside on appeal within time—Binding character of. Per Munro J :*—A Darkhast grant made by a Divisional Officer, without previously consulting the Presidency Port Officer, as required by Government Order Mis. No. 4017 is a perfectly good and valid grant, the same being within the scope of the Divisional Officer's authority.

The Divisional Officer is not bound to follow the opinion of the Presidency Port Officer, according to the Government Order mentioned.

Darkhast rules—*(continued).*

Per *Sakkaran Nair J.*:—A Darkhast grant by a competent authority is binding on the Crown unless it is cancelled on appeal within time.

The notice to the Port Officer required by Government Order No. 1017 is only a formality and the omission to give such notice before making a Darkhast grant of land within Port limits is a mere irregularity, the Revenue Officer not being bound to follow the opinion of the Port Officer.

Mahammade v. *The Secretary of State* 62

Death Illness :—*See* Mahamedan Law—Gift. 6

1. **Decree—Frame of**—*Reversioner — Suit to set aside alienations by widow* :—*See* Hindu Law—Widow. 11

2. ———**Form of**—*Hindu law—Decree debt—Sons on record as representatives of deceased fathers* :—See C. P. C., S. 234. 36

District Magistrate's powers of revision :—*See* Cr. P. C., 428.... 57

1. **Estoppel—Abandonment of point by advocate** :—

The suit was brought by the sons of the reversioner *S* of the last male owner *G*, on the death of *G's* widow *M.P.*, for possession of immoveable property. The last male owner died 40 years before suit, the widow in 1896, and the plaintiff's father, through whom the plaintiff's claimed, in 1899. The whole question in the case was one of plaintiff's father's relationship to the last male-holder. The defendant was the nephew of the last male-holder who took possession of the properties on the widow's death. The first court found that the plaintiffs had proved the pedigrees filed by them and gave a decree. On appeal the Judicial Commissioner held as follows:—" The oral evidence to prove the pedigree in the plaint is, in my opinion, of as little value as the documentary evidence on which the plaintiffs relied ; and at the hearing of the appeal practically no attempt was made to support the finding of the Subordinate Judge. The only contention was that accepting the pedigree filed by the appellant, *Mathura Pershad*, the plaintiffs are heirs of *G* as according to it they are *Samanodakas* and, therefore, in the absence of other nearer heirs they exclude the defendant" and gave a decree for possession of ⅛th of the property on the ground that there were other persons in the same degree of relationship to the last male-owner.

Held (1) that in the circumstances the plaintiffs were not, estopped by what happened before the Judicial Commissioner from attempting to establish that they were the heirs of *G*.

Kalka Parshad v. *Mathura Prasad* P. C. 424

2. ———**By conduct—Bequest with instructions**—*Instructions not carried out* :—*See* Will. 158

3. ———**Pre-emption**—*Withdrawal by pre-emptor of mortgage money deposited by purchaser in their capacity as mortgagees—No estoppel* :—*See* Mahomedan Law—Pre-emption. 116

4. ———**Pleader and client**—*Party not entitled to raise points not pressed by Vakil in Lower Court.*

Padmanabhadu v. *Rajappa* 158

Estoppel—(*continued*).

5. ———**Suit for mesne profits**—*Omission—Possession of land on partition—Subsequent suit for mesne profits against person who was in possession.*

Omission to take possession of lands even when possession was offered cannot deprive the party neglecting to take possession of the right to recover the subsequent mesne profits from the party who was in actual possession of the lands.

Sattaya v. *Thinkviah* 217

1. **Evidence Act—S. 32, Cls. (5), (6)—Pedigree**—*Admissibility.*

(1) That the pedigrees in the case were not ancient family records handed down from generation to generation and added to, as a member of the family dies or is born, but documents drawn up on a particular occasion for a specific purpose by members of the family, and must accordingly be treated as mere declarations made by the persons who respectively drew up or adopted them ;

(2) That the first pedigree, was not shown to have been made *post litem motam* and was, therefore, admissible ;

(3) That the second pedigree was on the evidence in the case clearly admissible as a declaration made by a deceased member of a family touching the family reputation or tradition on the subject of its descent and that in order to make the statement inadmissible on the ground that it was made *post litem motam*, the same thing must be in controversy before and after the statement was made ; *Freeman* v. *Phillips* (4 M. and S. 486, 494. 497) ; Shrewsbury Peerage (7 H. L. C. 1, 22) and *Duke of Devonshire* v. *Neill* (Ir. L. R. 132. Common Law) followed, and (4) that the third pedigree was inadmissible, having been made *post litem motam.*

Kalka Parshad v. *Mathura Prasad* (LORD ATKINSON) 424

2. ———**Ss. 91, 92**—" *Terms of the contract* "—*Question as to the parties contracting—Oral evidence—Admissibility—Proof that obligor signed as member of a firm.*

The question as to who the contracting parties are is not one relating to the terms of the contract within the meaning of Ss. 91, 92 of the Evidence Act ; and oral evidence is admissible to show that a person who signed a deed did so not only for himself but also as an agent for others, *e.g.*, as a member of a firm.

Venoutasubbiah Chetty v. *Govindarajalu Naidu* 1

Fraud—Sale with intent to effect fraud—*Sham sale—Judgment upholding sham transaction as real—Claim in execution by purchaser upheld—Subsequent suit by purchaser for possession—Defence that sale was sham* :—*See* C. P. C., S. 13. 576

———**Transfer in fraud of creditor**—*Purpose not carried into effect* :—*See* Trust Act, S. 81. 161

1. **Hindu Law—Daughter's sons inheriting the estate of maternal grandfather**—*Nature of estate—Survivorship ;—Obiter*—

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Hindu Law—(*continued*).

Daughter's sons of the last male-holder who are members of a Joint Hindu family take the estate of maternal grandfather with right of survivorship.

Krishnier v. *Lakshmi Ammal* 275

2. ———**Daughter-in-Law, widowed**—*Maintenance* :—*See* Hindu Law—Maintenance 254

3. ———**Debt**—*Decree debt*—*Sons brought on record as representatives of deceased father*—*Decree, form of* :—*See* C. P. C., S. 234 36

4. ———**Debt—Joint family**—*Liability of other members* :—The members of a Hindu joint family cannot be made liable in respect of a partnership debt incurred by one of the members unless it be that the other members of the joint family were interested in the partnership. *Krishna Ayyar* v. *Krishnasawmier* (I. L. R. 23 M. 597) referred to 847

Valamakonda Subbiah v. *Venkatramiah* ... ...

5. ———**Degradation**, *effect of—does not affect proprietary rights of the degraded* :—*See* Hindu Law—Inheritance 195

6. ———**Father's rights over property of divided son.**

It is not open to a Hindu father to deal with the property of his divided son so as to bind the latter even though it be in respect of an antecedent debt.

Rathna Naidu v. *Aiyanacharlar* 599

7. ———**Gift to wife**—*Malik*—*Presumption* — *See* Hindu Law—Will 7

8. ———**Husband's liability to maintain wife** :—*See* Hindu Law—Maintenance 254

9. ———**Inheritance—Disqualification—Heirs** — *Complicity in murder of deceased man—Quantum of proof—Onus—Acquittal in Criminal Court, how far proof of innocence—Unchastity of mother no test—Raghunandana, no binding authority in Southern India.*

A person who is guilty of the murder of another cannot succeed to the estate of the murdered man.

The acquittal of the person claiming to be the heir of the last owner on a charge of having abetted his murder, by a Criminal Court is no answer to a civil suit by the next heir claiming to succeed in preference to the defendant (the acquitted person) on the ground that the defendant had disqualified herself from inheriting to the deceased's estate by reason of her complicity in the crime. But the defendant's complicity should be proved by clear and satisfactory evidence in order that she may be excluded.

Unchastity is not a ground for excluding any female heir except a widow from inheritance.

A mother's claim to inherit the property of her deceased son rests on consanguinity and not on religious merit.

Neither degradation nor aggravated unchastity (*i.e.*, intercourse by a Hindu woman with a Mahomedan) affects the proprietary rights of the degraded or unchaste person.

Raghunandana is not an authority in the Madras Presidency.

Vedammal v. *Vedanayaga Mudaliar* 70

10. ———**Inheritance** — *Father's sister's son's son and daughter's daughter—Priority.*—The father's sister's son's son is entitled to succeed to the estate of a Hindu in preference to his daughter's daughter.

Hindu Law—(*continued*).

Appa Row v. *Gopal.Row* 409

11. ———**Joint Family**—*Evidence—Deed of sale of lands, suit to set aside—Ancestral lands—Onus—Proof—Conjectures.*

The plaintiffs, who were minors, brought the suit to set aside a deed of sale made by their father Dayal Singh to the appellants and certain other persons as purchasers, on the ground that the lands, the subject matter of the sale, were, in the view of the Hindu Law ancestral, and that the sale was not necessary, and was for a fictitious consideration and in fraud of the rights of the plaintiff's father Dayal Singh, as next heir and reversioner on the death of the widow of Dhanna Singh, the deceased owner. The only question in dispute on the appeal was whether the lands were ancestral. There was really no evidence that the lands in question came to Dhanna Singh by descent at all. There was evidence that he acquired some lands in the district by purchase from the owners and there was a probability that he acquired other by the abandonment of other persons who might have been collateral, and in that way might have become possessed of lands which by the custom of the Punjab would be regarded as ancestral. But there was no evidence whatever defining the boundaries of these portions of land respectively.

Held, that it was through their father as heirs of Dhanna Singh that the plaintiffs claimed and unless the land came to Dhanna Singh by descent from a lineal male ancestor in the male line, through whom the plaintiffs also in like manner claimed, they were not deemed ancestral in Hindu Law.

Held also, that when the onus lay, as it did in the present case, on the plaintiffs in seeking to set aside a solemn deed executed by their father, conjectures could not be accepted as a substitute for proof and that the plaintiffs failed to prove their case that the lands were ancestral.

Atar Singh v. *Thakar Singh P.C.* 379

12. ———**Maintenance, suit for— Widowed daughter-in-law**—*Plea in defence that the widow did not live with the husband during his life time. not good.*

A Hindu wife who without sufficient cause left her husband and lived apart from him during his life time does not forfeit her right to maintenance against the ancestral estate in the hands of the father-in-law after her husband's death, provided she is not otherwise disqualified thereto, *e.g.*, by unchastity, etc. Per *Wallis J.*:—But it is open to the Court to have regard to her conduct in so having separated from the husband, in fixing the amount of her maintenance. It is the right and also the duty of a Hindu wife to return to her husband after separation from him.

Per *Sankaran Nair J.*:—*Obiter* :—The husband is under a moral obligation to maintain his wife, though living apart. He is bound to support her though he should have no property at all and, if she quits him without any adequate excuse, he is not in law bound to maintain her.

The right to maintenance is one accruing from time to time; and a widow's right to it depends upon her wants and exigencies. The obligation of a Hindu husband to maintain the wife is quite distinct from that of the father-

Hindu Law—(*continued*). PAGE.

in-law to maintain a widowed daughter-in law and the fact that she did not live with her husband while alive is no answer to a claim for maintenance against the father-in-law in possession of the ancestral property on the husband's death.

Bangaramma v. *Bramhazee* 254

13. ———**Marriage Contract**—Bride price—Immoral or opposed to public policy :—See Contract Act, S. 23 408

14. ———**Mother—Inheritance** — *Consanguinity, the test :—See* Hindu Law—Inheritance 70

15. ———**Reversioner's right**—*Release of, when not a transfer of a chance of succession*:—See T.P.A., S. 6 (*a*) 459

16. ———**Reversioner, suit by to set aside alienation by widow**—*Pleadings—Contract—Decree, frame of* :—*See* Hindu Law—Widow. 11,18

17. ———**Reversioner—Suit by**—*Widow— Alienation partly for binding purposes, not void—Setting aside—Terms.*

A sale by a widow effected for the purpose of discharging debts binding on the reversion, even though more money than was actually necessary for the purpose of discharging the debts was obtained by the sale, is not void and cannot be set aside at the instance of the reversioner except on the payment of the amount binding on the reversion with interest when the widow dies.

Relief by way of a declaration is purely a discretionary relief. Where the reversioner who sued for it did not offer to pay the debt binding upon the reversion, the Court refused to grant the declaration.

Gowri v. *Tirumaya Bhatta* 17

18. ———**Reversioners—suit for declaration**—*Limitation—Suit barred against some barred against all—No fresh cause of action on the birth of each new member.* ... ...

Art. 120 is the article applicable to a suit by the reversioners for a declaration that the alienations made by a Hindu widow are not binding on them; and in the case of several reversioners, the suit will be barred against all if it is barred against one of them. A fresh cause of action and a fresh starting point of limitation could not arise on the birth of each new member of the family

Chiruvolu Punnamma v. *Chiruvolu Perraraju*, I. L. R. 29 M. 390 at 408 referred to

Krikshier v. *Lakshmi Ammal* 275

19. ———**Texts—Raghunandana** :—*No authority in Southern India. Vedammal* v. *Vedanayaga Moodelliar* 70

20. ———**Unchastity no ground for disinheritance** *except in the case of widow* :—*See Vedammal* v. *Vedanayaga Moodelliar* ... 70

21. ———**Widow—Adverse possession by**—*Nature of estate prescribed for* :—*See Limitation—Adverse Possession* 409

22. ———**Widow—Accretion to estate**—Where the holder of a life estate (*e. g.* a daughter) in a zamindary built a palace on zamindary land out of the income of the zamindary over which she had absolute power of disposal for Rs. 40,000 as a residence for zamindar for the time being.

Hindu Law—*(continued)*.

Held that apart from any question of intention on the part of the life-estate holder, the building should be held to have become part of the estate and should consequently devolve as part of the estate.

Held further :—That in the case in question, the intention of the life-estate holder was also to incorporate the building with the estate.

Appa Rao v. *Gopala Rao* 409

23. ———Widow—Alienation—Onus of proof—*Alienee from widow—Decree, form of.*

One who claims a title under a conveyance from a woman, with the usual limited interest which a woman takes, and who seeks to enforce that title against reversioners, is always subject to the burden of proving not only the genuineness of his conveyance, but the full comprehension by the limited owner of the nature of the alienation she was making and also that alienation was justified by necessity, or at least that the alienee did all that was reasonable to satisfy himself of the existence of such necessity. And this burden lies the more heavily on one who comes into court with the case that he did not take it from a limited owner, but from one whose title was adverse to that owner. Ratification, in the proper sense of the term, as used with reference to the law of agency, is applicable only to acts done on behalf of the ratifier, and a woman with a limited interest cannot by acts *ex post facto* charge upon the estate which she represents an obligation not originally binding upon it.

Held also.—That in a suit for possession by a reversioner or his assignee against a purchaser from a Hindu widow, on the ground that the sale was not good as such, there being no legal necessity for the same, the proper decree to be passed in case the Court should find in favour of the plaintiff would be one for possession conditional upon the payment by the plaintiff of the sums found to have been advanced for legitimate necessities ; and that the plaintiff was entitled to mesne profits and the defendant to 6 per cent. interest on such portion of the consideration as might be found binding on the reversion.

Dayal Singh v. *Dayal Sahu* ; *P.C.* 100

24. ———Widow—Alienation—*Consideration in part, binding on reversioners—Suit by reversioners to set aside—Pleadings—Contents—Decree, frame of.*

A Hindu widow is not bound to mortgage any portion of her husband's estate, if that be more prejudicial to her than a sale by reducing her income to a greater extent, as she does not hold the property for the benefit of the reversioner, nor is she bound to raise money on her personal security. The right of a reversioner to set aside a sale deed executed by a Hindu widow which is in part for a consideration binding upon the reversioner, depends upon refund of at least so much of the consideration as is binding upon the reversion, and in a suit to set aside the sale, the reversioner should offer to reimburse the *bona fide* purchasers of so much of the money as has been legitimately advanced. [*Mutheeram Kowur* v. *Gopaul Sahoo* followed.]

Hindu Law—(*continued.*) PAGE

Courts could not in the life time of the widow properly decree that upon her death the deeds should be set aside upon payment, by the persons who should succeed to the estate, of the amount which the widow was entitled to raise, inasmuch as it would be contingent upon the will of the persons who might succeed to the inheritance whether they would pay the amount or not, and the purchaser could not properly be placed by a decree of the Court in a state of uncertainty as to whether or not he could safely expend capital in the improvement of the estate. Such a decree would be unjust to the purchaser and it would be contrary to public policy to place an estate in that position in which it could not be known whether the estate could be safely improved or not. [*Poolchand Lal* v. *Raghoobuns Sahaye* followed. *Sugeeram Begam* v. *Juddoobuns Sahaye* referred to. *Gobind Singh* v. *Baldes Singh* dissented from.]

Kondayya v. *Bayamma* 11

25. ———**Widow's estate**—*Release by reversioners in favour of a widow—Validity—Alienation by widow—Partial alienation, validity—Estoppel.*

The presumptive reversioners of a widow's estate in consideration of a grant of certain portion of the estate to them renounced all their interest in the remainder of the estate and consented that the widow may dispose of it in any manner she pleased.

Per Curiam:—*Held.*—That the sons of the executants of the deed who happened to be the actual reversioners were estopped from disputing the validity of the alienations made by the widow in virtue of the release given by their father.

Per *Chief Justice* and *Wallis* J. (*Sankaran Nair, J. contra*)—The release given by the reversioners of their reversionary rights in the estate is not valid.

Per *Sankaran Nair* J.—The release is good as being a valid surrender of the whole estate to the reversioners and a re-conveyance by them to the widow.

Per *Chief Justice* and *Sankaran Nair* J. (*Wallis J. contra*).—A partial surrender by the widow or an alienation of part of the estate by the widow with the consent of the next reversioners is invalid

Rangappa Naik v. *Kamti Naick* 800

See also S.A. 379 of 05 reported in XIX M. L. J. 88.

26. ——— **Widow**—*Residence, right of—Personal right—not attachable* 571

27. ———**Widow—Surrender for consideration**— *When Valid—See* T.P.A.,S. 6 (*a*) 469

28. ———**Wife, gift to**—*Malik—Presumption—See* Hindu Law—Will 7

29. ———**Will—Construction—Bequest to daughters**—*Life estate with remainder to her sons.*

In construing the Will of a Hindu it is not improper to take into consideration what are known to be the ordinary notions and wishes of Hindus with respect to the devolution of property. It may be assumed that a Hindu generally desires that an estate, especially an ancestral estate, shall be retained in his family; and it may be assumed that a Hindu knows that, as

Hindu Law—(*continued*).

a general rule, at all events, women do not take absolute estates of inheritance which they are enabled to alienate. *Mukhomed Shumsool* v. *Shewukram*, 2 I.A. 7 at p. 14 approved and followed. [ ]

Where the only question raised upon the appeal was as to the nature of the estate which, in the events which had happened, the testator's daughter's took under the clause of the will of a Hindu inhabitant of Calcutta; *viz*. "I "desire and direct my executors, " * * * to make over and divide the whole of "my estate, both real and personal, unto and between my daughters in equal "shares, to whom and their respective sons I give, devise and bequeath the "same; but should either of my said daughters die without leaving any male "issue surviving, but leaving my other daughter her surviving, then in such "case the surviving daughter and her sons shall be entitled to the share of the "deceased daughter, or in the case of the death of either daughter leaving "sons, the share of such daughter is to be paid to such her son or sons share "and share alike."

Held, that the intention of the testator was to create in favor of his daughters an estate for life with a remainder over to their sons, and that, in, the events that had happened, the daughters of the testator were entitled to the testator's estate in equal shares for life and with benefit of survivorship between themselves.

Radha Prosad Mullik v. *Ranimoni Dassi* (SIR ANDREW SCOBLE.) 287

30.———Will—Construction—gift to wife—"Malik," meaning of—*Presumption—Onus.*

The use of the word "Malik" in a deed of gift or a will imports the grant of full proprietary rights to the donee or the devisee; and, in order to cut down the absolute ownership that the word imports, something must be found in the context to qualify it; and the fact that the donee is a woman and a widow does not suffice to displace the presumption.

The principles of interpretation laid down in *Lalit Mohun Singh Roy* v. *Chukkan Lal Roy* are of general application, though the donee in that case was a male. 24 I.A. 76 S. C; I.L.R. 24 C. 834.

Surajmani v. *Rabi Nath Ojha* (LORD COLLINS) ... ...

31———Will—Custom—Appointed daughter—*Obsolete.*

A Hindu after giving his widow power to adopt by his will provided as follows:—"If no boy is found, and if a daughter has a son, that boy becomes a *Dauhitrakarta* according to Dharmasastras, so that a boy alone should become the Karta for the entire property belonging to us."

Held:—That the will could be construed as appointing a daughter to raise a son only if there were in existence a living custom to which the words can be referred; and that the language in the will was not such as to indicate the testator's intention to revive a dead custom or create a new kind of heir for himself unknown to the law of the present day.

The onus of proving the existence of the custom is upon the person who relies upon it.

Appa Rao v. *Gopala Rao* 42

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1. Inam—Enfranchisement in favor of one *other than the registered minor—Effect of.—See* Madras Acts—Proprietary Estates—Village Services Act 603

2. ——Transfer of—*Subsequent enfranchisement,*—T. P. A., S. 43.

In the absence of any reservation in a transfer deed, the transfer of the land which is the subject of an inam, involves the transfer of the inam also, whether the inam be regarded as a grant of land or as the remission of the assessment thereon.

If an inalienable inam is transferred and the inam is subsequently enfranchised, the transferee is entitled to claim the land enfranchised by reason of S. 43 of T.P.A.

Any transfer of a village service inam is wholly null and void by reason of Reg. VI of 1831.

Angannayya v. *Narasanna* (*See* T.P.A.S. 4.)... 217

1. Insolvency, declaration of:—*See* C.P C.S, 351 189

2. ———Appeals—*Vakil's right of audience* :—*See* Vakil ... 556

Insolvent—*Properties held by insolvent after vesting order—Execution sale of right—Purchaser's right to maintain suit.*—*See* Right of Suit 487

Inspection—Corporation—*Right of members to inspect books*—*See* Corporation 346 353

Interest—Rate of—*Suit by puisne mortgagee for redemption after decree previously obtained by prior mortgagee without impleading puisne mortgagee—Contract rate.*—*See* Mortgage Decree—Form of 844

Interest Act XXXII of 1839—*Hindu Law on the subject of interest—When to be invoked.*

In order to bring a case under the provisions of the Interest Act, two things are essential; namely (1) an agreement or usage to pay interest, and (2) a demand in writing.

The Hindu Law is not binding on the Courts on questions of liability to pay interest.

Subramania Aiyar v. *Subramania Aiyar* 245

Issue—Construction :—*See* Privy Council—Practice... ... 3

Joinder of defendants .—*See* C. P. C., S. 28 265

Judgment "shall be dated and signed by the presiding officer"—*See* Cr. P. C., S. 367 197

1. Jurisdiction of Appellate Court *to go into the question of the propriety of the order of the first Court setting aside award*—See C.P.C., S. 521 228

2. ———Civil Courts to appoint trustees—*See* Religious Endowment Act, S. 14 205

3. ——Civil Court to direct action of Revenue Authorities—*Land Registration Act (Bengal).*—Civil Courts have no jurisdiction to direct the action of the revenue authorities under the Land Registration Act :—*Chhatrapat Singh Dugar* v. *Maharaj Bahadur Singh* (SIR ARTHUR WILSON) 1

Jurisdiction—(*continued*).

4. ——**Court to modify predecessor's order**—*No*—*See* C. P. C., S. 287 502

5. ——**To stay proceedings**—*In pursuance of order under S.* 476 *Cr.P.C., pending civil appeal*—*See* Charter Act, S. 15 ... 466

6. ——**Subordinate Court to call upon receiver appointed by High Court to furnish accounts**—*See* C.P C., S. 503 ... 589

Jury—Charge to—*Misdirection*—*See* Cr.P.C., S. 297... ... 514

Katlai—*Purchase of land in the name of idol*—*Deed in the custody of donor*—*No reservation*—*Power to appoint Manager of Katlai*—*See* Religious Endowments 304

Landlord—Co-sharer landlord—*Suit by one for entire rent*—*Right to receive his own share separately*—*See* Bengal Tenancy Act, S. 188 ... 43

Landlord and Tenant—Ejectment—Notice—*Tenant under usufructuary mortgagee*—*Disclaimer in written statement*—*Estoppel.*

A denial of the landlord's title for the first time in the written statement in an ejectment suit does not disentitle the tenant from pleading want of notice. A tenant of the usufructuary mortgagee is entitled to a reasonable notice before ejectment by the mortgagor.

Held also that a 15 days' notice in the middle of the cultivation season was not a sufficient notice.

Periyakaruppan v. *Subramanian* 153

Legal Practitioners Act, S.14—*Professional misconduct*—*Transfer of the case to the Court to which the presiding officer was transferred*—*Jurisdiction to issue warrant or summons on failure of pleader to appear*—*Use of bad language to Court by a pleader suitor*—*No professional misconduct.*

A charge under S. 14 of the Legal Practitioners Act must be dealt with by the presiding officer of the Court wherein the charge is made, and there is no provision of law authorizing the transfer of the case to the file of the Court to which the officer who presided over the Court in which the charge was originally made has been transferred subsequently. It is not competent to a subordinate Court charging a pleader with professional misconduct under S. 14 of the Legal Practitioners Act to issue either a summons or a warrant against the pleader, if he fails to appear in answer to a charge under the section. The penalty for non-appearance in answer to the charge is that a report may be made without the pleader being heard in his own defence. The use of language by a pleader, such as, that the Magistrate had acted "maliciously, vexatiously and with a vindictive spirit" in a written statement attached to a warrant issued against himself, though improper to the last degree, does not amount to "fraudulent or grossly improper conduct in the discharge of his professional duty," the same being used only in the pleader's capacity as suitor and not as a pleader.

In re a Pleader 184

1. **Letters Patent—(Madras) Cl. 15**—*Whether whole case open on appeal*:—*Per Curiam*:—On an appeal from a judgment of two judges of

Letters Patent—(*continued*). PAGE

the High Court who differed in opinion, the appeal is not confined to the point upon which the Judges differed, but the whole case is open on the appeal.

Shaik Mahomed Ravuther v. *B.I.S.N. Co.* F. B.; 497

2. ——— **Ss. 28, 29**—*Power of High Court to stay criminal proceedings taken in consequence of order under S. 476, Cr. P.C.—Stay of proceedings pending appeal on the Civil Side from original decree:—See* Charter Act, S. 15. 466

Limitation—Adverse possession by Hindu widow or daughter as life-estate-holder—*Estate prescribed for*.—If a man obtains possession of land claiming under a deed or will, he cannot afterwards set up another title to the land against the deed or will though it did not operate to pass the land in question, and if he remains in possession till 12 years have elapsed and the title of the testator's heir is extinguished he cannot claim by possession an interest in the property different from that which he would have taken if the property had passed by will or deed. *Dalton* v. *Fitzgerald*, 2 Ch. D. 98 followed. A Hindu widow or daughter succeeding to a Dharmakartaship held by the last male owner cannot, by possession for over 12 years claim any more interest in the Dharmakartaship than a life estate which is the interest they would have ordinarily taken if the same had passed to them by will or deed.

Appa Rao v. *Gopal Rao* 409

1. **Limitation Act, Ss. 4, 14**—*Regulation Collector under the Court of Wards not a Court:—See* Court of Wards 581

2. ——— **S. 5 A.**—*Appeal by dead man—Legal representatives brought on record—Delay excused.*

An appeal presented on behalf of a deceased party may be bad, but the Court may, in a proper case, treat the appeal as filed on the day on which the legal representatives were brought on record and excuse the delay.

Subbarayudu v. *Lingayya* 461

3. ——— **Art. 11**—*C.P.C. S. 335—Suit by party against whom the order is made—Joinder of strangers as parties after one year, to a suit filed within the year.*

The limitation provided for by Art. 11 of the Limitation Act applies to suits under S. 335, C.P.C., only in so far as it is against the person in whose favour the order was made; consequently the fact that other persons were joined after the limitation period as parties on the representation of the person in whose favour the order was made, that he was only a benamidar for parties so added, will not bar the suit.

Aiyam Chetty v. *Poongavanam* 464

4. ——— **Arts. 29, 49, 62, 120**—*Suit for value of property attached and sold wrongfully—Cause of action—C.P.C. S. 283.*

Per *Full Bench (Sankaran Nair J. dissentiente)*,—A suit for the value of paddy wrongfully attached by defendants in execution of a decree and sold is governed by Art. 29 and limitation begins to run from the date of the wrongful seizure.

Limitation Act—(*continued*).

Per *Sankaran Nair* J.—The article applicable is either Art. 62 or Art. 120, and the cause of action arises from the date of distribution of the sale proceeds among the defendants.

Per *Chief Justice*:—Art. 29 is not restricted in its application to claims for consequential damages.

Per *Chief Justice* and *Pinhey* J:—S. 283, C.P.C., and Art. 11 of the Limitation Act do not affect the scope of the other articles of the Limitation Act.

Narasimha Rau v. *Gangaram* 590

5. ———**Arts. 32, 120**—*Injunction—Suit for, as between co-owners.*

A suit by one co-owner for an injunction restraining the other co-owners from obstructing a common way is governed by Art. 120 and not by Art. 32 of the Limitation Act.

Musaly v. *Lakshumayya* 602

6. ———**Art 49.**—*See Limitation Act* (4).

7. ———**Art. 62.** *Do.* (8)

8. ———**Arts. 83, 113, 116**—*Suit on covenant—Exchange deed—Indemnity clause, suit on—No suit for specific performance—Cause of action.* See Art. 113. 477

9. ———**Arts. 95, 62, 97**—*Suit for damages for fraud—Onus—Proof of fraud—Suit by assignor against assignee for fraudulent assignment.*

In a suit for damages for fraud, when it is doubtful at what precise time the fraud became known to the plaintiff, the onus is on the defendant to show that the suit is out of time.

A suit for damages by an assignee of a debt against the assignor for having fraudulently assigned by the debt when it was not really due to the latter is governed by Art. 95 of the Limitation Act and not by Art. 62 or 97.

The assignee is not bound to assume the truth of the debtor's case as to the non-existence of the debt assigned as soon as the debtor files his written statement in the suit against him on the assigned debt; and time for a suit for damages by the assignee against the assignor for fraudulent assignment, was held to have run in the case from the date of the judgment of the Munsif in the prior suit declaring that the debt was not due to the assignor.

Punnayil Kutti v. *Raman Nair* 19

10. ———**Art. 97.** *see Limitation Act.* (8).

11. ———**Arts. 113, 116, 83**—*Suit on covenant—Exchange deed—Indemnity clauses, suit on—No suit for specific performance—Cause of action.*

A registered exchange deed provided as follows:—"There is no dispute in respect of the said lands. If disputes should arise, the respective party shall be answerable to the extent of his private property." *Held* that a suit on the covenant by one of the parties on dispossession is governed by Art. 116 and not by Art. 113: and that the cause of action arose on the date of dispossession, the covenant being a special covenant to indemnify, though in the absence of the special contract, the covenant will be a covenant for title, in which case the cause of action would have arisen on the date of the deed.

Srinivasa Raghava Dikshitar v. *Rangasami Iyengar* 477

Limitation Act—(*continued*). PAGE

12. ————Art. 120—*Reversioner's suit for declaration about invalidity of alienation* :—See Hindu law—Reversioner's suit ... 275

13. ————Arts. 139, 144—"*Tenant*"—*Representative of tenant at sufferance no "tenant.*":—The representatives of a tenant by sufference who enter after his death are not tenants within the meaning of Art. 139 of the Limitation Act, and a suit against them is governed by Art. 144.

Narasimham v. *Seetharamamoorthy* 26

14. ————Art. 148—*Mortgage—Redemption—When the right to redeem accrues.*

A mortgage was executed in 1828 and was made redeemable at the end of any native year from that date. The present suit for redemption was brought in 1902.

Held that the suit was barred.

Vishvendra Tirthswami v. *Vishnumurti Bhatta* 285

15.————Art. 169—*Applicability—No service on respondent—Service without declaration under S. 82, C. P. C.—No good service.*

Art 169 of the Limitation Act has no application to cases where the respondent had no notice of the appeal itself.

Venkobachar v. *Raghavendrachar.* 96

16. ————Art. 170.—*See Limitation Act* (4).

————Arts. 178, 179—*Execution—When prior application to be considered pending.*

So long as the proceedings in execution initiated by the decree-holder are pending, his right to apply for their continuance occurs from day to day, *i.e.*, on every day on which the Court does not *suo motu* continue them. The right to apply for execution will not be barred till 3 years have elapsed after the proceedings have ceased to be pending.

An order "dismissing" an execution petition on the ground of stay of execution pending an appeal to the Appellate Court is not a nullity ; but, if passed without notice and the absence of parties, it cannot be regarded as an order between the parties at all, but is merely a direction to the officer of the Court to remove the proceedings from the pending list.

The execution petition itself should, under the circumstances, be considered as pending. A decree-holder applied for execution on 8—10—'99. Objection was taken by the judgment-debtor that the debt was satisfied. On 31—10—'99 the Munsiff disallowed the objection. The judgment-debtor appealed. There was an order by the Appellate Court for stay of execution and the Munsiff passed an order on 15—12—'99 :—"Execution ordered to be stayed ; petition dismissed." On 20—7—'00 the Appellate Judge reversed the order of the Munsiff and remanded the petition for further enquiry and on 25—1—'01 the Munsiff decided that the decree has been satisfied. On 11—12—'01 the District Judge on appeal reversed this order ; on 29—10—'03 his decision was confirmed by the High Court. The present application for execution was presented on 9—7—'03. *Held*, that under the circumstances, the application of 8—10—'99 should be considered pending and that the

Limitation Act—(*continued*).

present application was barred only so far as it was a fresh application for execution, *i. e.*, in so far as it asked for attachment of property not proceeded against in proceedings instituted by the application of 1899 and that in so far it repeated what the application of 1899 prayed for, it was not barred.

Kotiah v. Alamelammal 46

17. ——**Art. 179, Cl. 4**—*Application in accordance with law—Step in aid of execution—C. P. C., S. 232—Application by the transferee-decree-holder to be recognized as such.*

Where a Court received an application by the transferee-decree-holder for recognition as transferee and ordered the same, without returning it on the ground that it was not in accordance with S 232, C. P. C., and there was no appeal from the order, *held* that the application was an application in accordance with law and that a subsequent application for execution within 3 years from the date of the original application was not barred.

Obiter:—An application by the transferee-decree-holder for the mere recognition by Court as transferee is a step in aid of execution.

Annamalay Mudaliar v. Ramier 24

18. ——**Art. 179, Cl. 4—Step in aid of execution**—*Application not in accordance with law.*

An application for execution though not in accordance with law, may help to save limitation if it contains a prayer for the issue of a notice under S. 248, C. P. C., in a case in which a notice is necessary in order to enable execution to proceed.

Kamakshi Pillai v. Ramasamy Pillai 14

Madras Act II of 1864:—*See* Revenue Recovery Act.

——**VIII of 1865**:—*See* Rent Recovery Act.

——**V of 1884**:—*See* Local Boards Act.

——**VI of 1884**:—*See* District Municipalities Act.

——**I of 1886**:—*See* Abkari Act.

——**II of 1894**:—*See* Proprietary Estates Village Service Act.

——**V of 1900**:—*See* Malabar Compensation for Tenant's Improvements Act

——**I of 1902**:—*See* Court of Wards Act.

——**III of 1904**:—*See* City Municipal Act.

——**Abkari Act I of 1886, S. 62**—*Peon—Words—"Abkari Officer."*

A peon is not an Abkari officer within the meaning of S. 62 of the Madras Abkari Act I of 1886.

In re Pachappa Chetty 455

1.——**City Municipal Act III of 1904, Sch. VI, Cl. 1**—*"Propelled—Trailer Cars."*

Trailer Cars are vehicles with springs and are "propelled" within the meaning of the words as used in Sch. VI of Madras Act III of 1904.

Madras Tramways Co. v. The Madras Corporation 149

Madras Acts—(continued). PAGE

2. ———City Municipal Act III of 1904, S. 176, Sch. V

"Capital" Meaning of—Statutes—Interpretation—Principles.

Held :—That the word "capital" in Sch. V of the Madras City Municipal Act III of 1904 does not mean exclusively nominal capital.

Held also : That in the case of the Fund in question having a declared nominal capital of Rs. 29,99,976 divided into 357,168 shares of Rs. 84 each. Subscribed for by payment of Re. 1 per mensem over a period of 7 years (the payment not being demandable in advance) the word "capital" should be interpreted only as "paid-up capital."

The ordinary and popular meaning of the word "capital" is money actually contributed for employment in business. The underlying principle of Sch. V seems to be that taxation should be roughly proportionate to the professional incomes of individuals and the profits of companies. The subject is not to be taxed unless the language of the statute clearly imposes the obligation, and in case of reasonable doubt the construction mest beneficial to the subject is to be adopted.

The Indian Companies Act cannot be resorted to in the interpretation of the City Municipal Act, as the two Acts are not in *pari materia.*

In construing an Act, in the absence of a definition of a word in the Act itself, the presumption is that the word is used in the Act in its ordinary and popular meaning. S. 176 of the Madras City Municipal Act hardly contemplates a reference in general and abstract terms. It only empowers the Magistrates to state a case on any appeal before them and refer the same for the decision of the High Court, *i.e.,* to state all the matters necessary for the decision of the particular case before them on appeal and to refer the case so stated for decision.

The Mylapore Fund v. *The Madras Corporation* 349

———District Municipalities Act, Ss. 85 and 88—
Registration of cart—Obliteration of number on one axle and painting it on another—Illegal collection of toll—Municipality not liable.

Removing the registration number from one axle and affixing it on another is not an offence within the meaning of Ss. 85 and 88 of the District Municipalities Act, unless it be that such affixing is contrary to any bye-law of the Municipality or a direction given by the Municipality under S. 85. Where the number was so removed from one axle and affixed to another axle of a cart by the owner, the Municipality is not liable in respect of tolls illegally collected by the toll contractor, but is only liable in respect of any license fee collected by itself.

Srinivasa Chariar v. *Kumbakonam Municipal Council* 377

———Local Boards Act — *Madras Act V of 1884—Duty of maintaining roads—Improvement of tunnels and culverts under the road—Damage to adjacent owners.*

An authority to construct a road carries with it the authority to construct the water-ways necessary to enable the road to be carried safely

Madras Acts—(*continued*).

across the drainage of the country, and the same rule applies to roads vested in District Boards by Act V of 1884 (the Madras Local Boards Act). Act V of 1884 enjoins the maintenance of roads vested in it and does not confine the Board to its maintenance as originally designed or executed ; and in the absence of any such express restriction, the injunction to maintain, imposes the duty to provide such new works as it may be found necessary from time to time to provide in order that the road may be properly maintained. The duty cast upon the District Board of maintaining the road necessarily involves the duty of maintaining the necessary culverts and tunnels under it and making such improvements in them as may be found essential for the purpose.

Held also :—That, in the absence of proof that the District Board could have constructed a culvert at any other part of the road, which, while effective to protect the road, would have done no injury to the plaintiffs' lands, the plaintiffs were not entitled to an injunction.

Aiyasami Aiyar v. District Board, Tanjore 92

———**Malabar Compensation for Tenants' Improvements Act**—*S. 7 of Act VII of 1887 and S. 19 Act I of 1900—Scope of—Improvements effected after 1886 in virtue of contracts made prior to 1886.*

S. 7 of the Malabar Compensation for Tenants' Improvements Act, VII of 1887 (reproduced as S. 19 of Act I of 1900) precludes parties from contracting themselves out of the Act by any contract made after January 1st, 1886 ; but it does not affect the validity of contracts made prior to that date, whether the improvements were made before or after January of 1886, in which case the rate of compensation is governed by the terms of the contract itself.

Kunhiow v. Nerath Kunhi. 98

———**II of 1894 — Proprietary Estates Village Service Act**.—**S. 13**—*Registration—Effect of—Inam—Enfranchisement in favour of another.*

The effect of registration under S. 13 of Madras Act II of 1894 is merely to declare that the person registered is entitled, on attaining majority or within three years thereafter, to be appointed to the office provided he is duly qualified ; and it does not give the registered person any right to sue for the inam lands attached to the office and enfranchised in favour of another.

Appalarazu v. Sarasamma. 608

1. ———**Rent Recovery Act**—*Landlord and tenant in possession during the fasli—Liability—Subsequent transfer.*

The person in possession of the land during the fasli is the one responsible for the rent of the fasli, and a decree can be passed against him if a proper patta had been tendered to him, even though he had parted with the lands on the date of suit.

Orr v. Chockalingam. 494

2. ———**Rent Recovery Act**—*patta, tender—Transfer by the old tenant—'Bonafide dispute.'*

Madras Acts—(*continued*). PAGE

A person claiming to have a patta tendered to him as transferee from a tenant is, no doubt, bound, if called on, to produce the transfer-deed for the Zamindar's inspection in proof of his claim; but if it is not apparently in order, and if, after notice, which it is the Zamindar's duty to give to the old tenant, the latter does not contest the validity of the transfer, it is the duty of the Zamindar to grant a patta to the new tenant. The rule that the landlord cannot refuse to grant the patta to the old tenant on the ground of transfer must be confined to cases where there is a *bona-fide* dispute as to the transfer between the old and the new tenants. *Orr* v. *Rakkumarathi* explained.

Venkataramiah v. *Venkata Rungia.* ... 37

3. ——— **Rent Recovery Act**—*Patta — Supply of water at tenants' request—Share in produce to landlord—Water rate—Proportionate liability—Maxim "Qui commodum sentit sentire debet onus."*

Where water was supplied at the request of the tenant and the landlord has been allowed half the produce raised with the water: *Held* that the tenant can be held liable only for half the water rate.

Subramaniem v. *Venkatasubbaraya* 563

4. ——— **Rent Recovery Act, S. 7—Dispensation of Patta** *not to be inferred from mere acceptance of muchilikka.*

The mere acceptance by the landlord of Muchilikka accepted by the tenant is not sufficient proof that the patta has been dispensed with.

Varathachari v. *Balu Naiken* (I. L. R. 3 M. 255) : *Narayana* v. *Muni* (I. L. R. 10 M. 36) referred to.

Mallikarjuna v. *Papayya* 246

5. ——— **Rent Recovery Act, S. 11**—*Propriety of patta—Improper stipulation—Term restraining tenant from cutting trees—Fruit-bearing and other trees.*

A patta containing a term restraining the tenant from cutting fruit-bearing trees is a proper puttah. A term restraining the tenant from cutting trees other than fruit-bearing trees is improper.

Thimmanayanim v. *Rama Rayanim* 567

——— **Town Nuisances Act, S. 3** (b)—*Exposing fish for sale—Obstruction.*

Where the evidence established conclusively that owing to the accused's selling fish on the roadside near the market, numbers of people collected there and caused an obstruction.

Held that the accused committed an offence under S. 3 (*b*) of the Town Nuisances Act.

King-Emperor v. *Kanna* 329

1. **Mahomedan Law—Death illness**—*See* Mahomedan Law—Gift. 6

2. ——— **Durga** — *Married man unfit to be a Jalnashin—See Miyaji* v. *Sheik Ahmed* 205

3. ——— **Gift**—*Marz-ul-mout—Death-illness—Question of fact—Privy Council practice.*

Mahomedan Law—(*continued*).

In deciding whether a gift is invalid under the law of *Marz-ul-mout*, the right question to be solved is, whether the deed was executed by the donor under apprehension of death; and that the question is essentially one of fact.

Fatima Bibi v. *Sheik Ahmed Buksh* 6

4. ———**Pre-emption** — *Claim to pre-empt — Delay — Question of fact — Privy Council practice — Estoppel by conduct — Withdrawal by pre-emptors of mortgage-money deposited by purchaser in their capacity as mortgagees.*

The right of pre-emption must be exercised and the claims necessary to give effect to it must be made with the utmost promptitude, and any unreasonable or unnecessary delay is to be construed as an election not to pre-empt.

The question whether there has been such delay is a question to be determined upon the facts of each particular case.

The pre-emptors in the case obtained all the necessary information about the sale on the 5th of a particular month. On the 6th they applied to the proper officer for a police guard to protect the messengers taking the money to the purchaser. They obtained the guard on the 7th and the messengers made the claim of pre-emption at the house of the purchaser on the same day.

Held:—That there was no delay on the part of the pre-emptors so as to disentitle them to pre-empt, and that the grounds on which the High Court differed from the trial Judge on this question of fact were insufficient for a reversal of the judgment of the first Court.

Held also:—That the withdrawal by the pre-emptors of the mortgage-money deposited in Court by the purchaser, in their capacity as assignees of a mortgage on the property sold was no recognition of the purchaser's title and was quite consistent with their claim to pre-empt.

Baijnath Gaenkar v. *Ramadhari Chowdry*; P C. 116

5. ———**Wakf**—*Decree directing sale of wakf property*:— A decree directing the sale of wakf property may in certain circumstances be perfectly valid.

Badruddin Sahib v. *Abdul Rahim*. 21

1. **Malabar Law—Decree against Karnavan**—*Subsequent division into Tavazhi—Procedure.*

The members of a tarwad cannot escape liability for debts or decrees binding on the tarwad by dividing themselves into tavazhis; but where the Karnavan of the original tarwad has ceased to represent them they cannot be bound by proceedings in execution of a decree against him unless they are separately represented in the execution proceedings.

Kannan v. *Suppi* 132

2. ———**Marumakkathayam Law**—*Gift by Mahomedan husband to wife and children governed by Marumakkathayam Law—Estate taken.*

Malabar Law—(*continued*).

Held, that in the case of a gift to a woman and her children, governed by the Marumakkathayam Law, by her husband, a Mahomedan, the donees take the property with the incidents of tarwad property.

Pathumma v. *Abdulla Haji* 16

Malicious prosecution—*Suit for damages—Principles applicable to the case—"Prosecutor"—Malice, foundation of the action—When may malice be shown—Defendant's knowledge as to the falsity of the charge—Liability.*

The principle laid down in the case of *Narasinga* v. *Muthaya Pillai*—(I. L. R. 26 M. 362) "the only person who can be sued in an action for malicious prosecution is the person who prosecutes"—is sound enough if properly understood, and its application to the particular case was no doubt justified; but it is not of universal application.

In India if a complainant does not go beyond giving what he believes to be correct information to the Police, and the Police, without further interference on his part (except giving such honest assistance as they may require), think fit to prosecute, it would be improper to make him responsible in damages for the failure of the prosecution. But if the charge is false to the knowledge of the complainant, if he misleads the Police by bringing suborned witnesses to support it, if he influences the Police to assist him in sending an innocent man for trial before the Magistrate—it would be equally improper to allow him to escape liability because the prosecution has not, technically, been conducted by him. The foundation of the action is malice, and malice may be shown at any time in the course of the inquiry. The question in all cases for damages for malicious prosecution must be—Who was the prosecutor? and the answer must depend upon the whole circumstances of the case. The mere setting of the law in motion is not the criterion; the conduct of the complainant before and after making the charge must also be taken into consideration. Nor is it enough to say, the prosecution was instituted and conducted by the Police. That again is a question of fact. A prosecution, though in the outset not malicious as having been undertaken at the dictation of a Judge or a Magistrate or if spontaneously undertaken from having been commenced under a *bona-fide* belief in the guilt of the accused, may, nevertheless, become malicious in any of its further stages, if the prosecutor, having acquired practical knowledge of the innocence of the accused, preserves *malo animo* in the prosecution with the intention of procuring *per nefas* a conviction of the accused. *Narasinga* v. *Muthaya Pillai* (I.L.R. 26 M. 362) explained and distinguished; *Fitzjohn* v. *Mackinder* (9 C. B. N. S. 505) followed.

Gaya Parshad v. *Bhagat Singh*; P. C. 394

Mandamus—Issue of writ—*Principles of—See* Corporation ... 355

Maritime Law—Bill of Lading—*Construction—Carrier's negligence—Contract between carrier and consignor—Terms opposed to public policy—Contract Act, Ss. 23, 151—Common Carriers Act—Act III of 1865—Statute construction—Applicability of principles embodied in Act to cases outside the Act—English Common Law, applicability of, to Indian cases.*

Maritime Law—(*continued*).

Per *Chief Justice* and *Wallis* J. (*Sankaran Nair* J. *contra*):—Contracts exempting a carrier from liability for the negligence of his servants are not void in India as opposed to public policy.

The defendant company undertook to carry some bags of rice belonging to plaintiffs and deliver them at Tuticorin. The goods were landed and stored on the foreshore at Tuticorin from the 24th to 30th October. On account of heavy rains from the 27th October, the goods were damaged. The finding of the District Judge was that the plaintiffs were not guilty of negligence. Both *Subramanya Aiyer* and *Miller* JJ were of opinion that the defendants were guilty of negligence.

Held, per *Chief Justice* and *Sankaran Nair* J. on the facts found, that no precautions having been taken by the defendants to prevent the goods being damaged by rain, the defendants were negligent and were liable for the damage to the goods.

Per *Wallis* J.—The manner of discharging is, in the absence of special terms, to be determined by reference to the regulations and practice of the port of discharge: that having regard to the custom of the port and the other circumstances of the case, the defendants were not liable.

The bill of lading contained in addition to an exception clause as regards "accidents, loss or damage from any act, neglected or default whatsoever of the pilot, master or mariners or other servants of the company" another clause which ran thus: "In all cases and under all circumstances, the liability of the company shall absolutely cease when the goods are free of the ship's tackles, and thereupon the goods shall be at the risk for all purposes and in every respect of the shipper or consignee."

Chief Justice:—A ship owner is not exempted from liability for negligence unless the contract which exempts him is both clear and express, and the contract, evidenced by the bill of lading in the present case, though perhaps clear, was certainly not express so as to protect the defendants from liability for their negligence in landing the goods.

Per *Wallis* J.:—The carriers have sufficiently protected themselves from liability for the negligence of their servants during the discharge of the cargo.

Per *Sankaran Nair* J.—A ship-owner is a bailee within the terms of S. 151 of the Contract Act. A common carrier may exempt himself from the liability of an insurer by contract, but cannot exempt himself from the liability of an ordinary carrier imposed by S. 151 of the Contract Act, and a contract in India so exempting him is opposed to public policy. The obligation imposed by S. 151 of the Contract Act applies to bailees as well as to their servants in the discharge of their duty. The later developments in the Common Law in England as to the capacity of a common carrier to exempt himself from liability for loss due to his own negligence has not been adopted in India, but has been declared inapplicable by Act III of 1865 to the cases falling within the Act.

Shaik Mahmad Rowther v. *B. I. S. N. Co.* (F.B.)... 497

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Marriage—Presumption—*Essentials to raise presumption.*

Before applying the presumption of marriage arising from cohabitation with habit and repute, it is necessary to make sure that the conditions necessary for its existence do exist. First of all, there must be some body of neighbours, many or few, or some sort of public, large or small, before repute can arise. Secondly, the habit and repute, which alone is effective, is habit and repute of that particular status which, in the country in question, is lawful marriage. The difference between English and Oriental customs about the relations of the sexes makes such caution especially necessary. Among most English people, open cohabitation without marriage is so uncommon that the fact of cohabitation in many classes of society of itself sets up, as a matter of a fact, a repute of marriage. But in countries where customs are different it is necessary to be more discriminating, more especially owing to the laxity with which the word "wife" is used by witnesses in regard to connections not reprobated by opinion, but not constituting marriage.

Ma Wan Di v. Ma Kin 8

Memorandum of objections in appeals from orders—*See* C P. C., S. 561 157

Mesne profits, suit for—*Omission to take possession when offered possession—Right to sue subsequently for mesne profits—No estoppel:—See* Estoppel 217

Misdirection to Jury—*See* Cr. P. C., S. 297 541

Mortgage deed—Construction—*Estoppel by judgment—Privy Council practice.*

A clause in a mortgage deed ran as follows:—"In case of default in payment by me (mortgagor) of instalments of interest at the time herein appointed the mortgagee shall have, immediately on such default, power either to recover the whole of his principal, interest and (*Sud marid manafa mazkura*) further interest on the said interest according to the rate herein fixed or the said mortgagee shall in default of payment of the instalment or instalments of interest aforesaid take possession of the mortgaged property."

Held:—On a construction of the clause, that the mortgagor was not liable for compound interest, the mortgagee in the case having entered into possession. Another clause provided that an enhancement of the revenue at a resettlement and a consequent shrinkage, shall give the mortgagee a cause of action.

Held also, on the construction of the whole deed in question, that the mortgagee was entitled to get from the mortgagor, over and above the usufruct, the amount paid by him on account of maintenance and enhanced Government revenue.

A third clause ran as follows:—

"Whenever after the term of the mortgage or during the said term I pay to the mortgagee in any Khali Fush (fallow season) i.e., in the month of Jeith,

Mortgage deed—(*continued*).

the whole of the mortgage money and the whole of the interest together with the Government revenue, arrears of rent and takavi advances from tenants......without raising any objection of law such as limitation.........the mortgagor, shall have the power to redeem.

Held on a construction of this clause that the mortgagee was entitled to get the money due to him from the tenants on account of arrears of rent whether its recovery is barred by limitation or not.

The mortgagee in the case brought a suit against the mortgagor alleging that a certain sum was due to him on the date of suit and praying for possession, or, in the alternative, for recovery of the amount with further interest. The Commissioner appointed for the purpose of taking accounts reported that a certain sum was due. The Court held that there was no necessity for passing an order as to the amount due beyond saying that the account was correct and placed the mortgagees in possession. The amount was arrived at by calculating compound interest on unpaid instalments.

Held that in a subsequent suit by the mortgagor or his assignee for redemption, the plaintiff was not precluded from contending that compound interest was not payable.

Held, also, that the costs of the prior suit were not to be included in the accounts in favor of the mortgagees, there being nothing in the mortgage deed to support it.

Their Lordships declined to allow a party to raise a point not taken in both the Courts below.

Muhammad Naseem v. Muhammad Abbas, P.C. 133

Mortgage—Sub-mortgage—*Sub-mortgagee's right whether affected by payment by original mortgagor after notice of the sub-mortgage.*

The rights of a sub-mortgagee cannot be affected by transactions between the original mortgagee and the mortgagor effected after notice of the sub-mortgage; and the sub-mortgagee who brings a suit on his sub-mortgage and purchases in execution sale the rights of his mortgagor (*i.e.*, the original usufructuary mortgagee in this case) is entitled to possession of the lands and cannot be met in a suit against the original mortgagor for possession by the plea of payment of the original mortgage after the date of the sub-mortgage when the same had not been made before notice of the sub-mortgage.

Narayana Mudali v. Raghavammal 462

———**Subrogation** — *Payment of mortgage amount by vendee whose title has been subsequently found invalid.*

A vendee who while in possession of the property purchased paid off a mortgage on the same but whose purchase was subsequently held invalid, is entitled to be reimbursed with the amount paid by him in discharge of the mortgage.

Chama Swami v. Padala Ananda 306

Mortgage decree, form of—Interest, rate of—Suit by puisne mortgagee for redemption after decree previously obtained by prior mortgagee without impleading puisne mortgagee. A prior mortgagee brought a suit for sale, obtained a decree, and purchased the properties himself. The prior mortgagee was not aware of a second mortgage on the property and consequently did not implead the puisne mortgagee. *Held* : that in a suit for redemption by the puisne mortgagee the prior mortgagee should be allowed interest on the mortgage amount at the contract rate up to the date fixed in the decree for redemption. The prior decree obtained by the prior mortgagee can only operate as between the parties to the suit and those who claim under them ; and it would be unjust if the puisne mortgagee is allowed to use the decree to cut down the prior mortgagee of her interest, while he deprives her of the whole advantage of it.

Semble :—The equitable considerations which appear to have prevailed with the Judges in *Gangadas Bhattas* v. *Jogendra Nath Mitter* (11 C.W.N. 408) are applicable only to a case where the prior mortgagee has omitted to implead the puisne mortgagee with knowledge of his existence.

Thenappa Chettiar v. *Marimuthu Nadan* 345

———*Mortgage with possession — Accounts* — The mortgage bond provided that the mortgagee was to take the usufruct, *i.e.*, the annual melwaram for the principal. *Held* that the mortgagee in possession was entitled only to the Court rate of interest on the principal amount from the date fixed for payment and not to the melwaram of the property under the mortgage.

Audipurnam Pillay v. *Gopalsawmi Moodelly* 259

———*Form of—Marshalling as between a first mortgagee and a subsequent purchaser of one of the mortgaged properties—See* Transfer of Property Act, S. 56. 229

———*form of—Suit by puisne mortgagee for sale subject to the prior mortgage.*

It is the right of the prior mortgagee to require the second mortgagee to redeem him or submit to a sale of whatever interest he holds in the property, and the decree must give effect to this right, unless by doing so it unnecessarily deprives the puisne mortgagee of any right of his own. A puisne mortgagee cannot by impleading the prior mortgagee in a suit for sale insist on a decree for sale subject to the prior mortgage. Ordinarily, in a mortgage suit, when all the interested parties are before the Court, it is the duty of the Court, if it can do so, to make a decree which shall deal finally with the questions between them and shall preclude the necessity of further litigation for the enforcement of any right arising out of the mortgage or mortgages in question in the suit.

The proper decree to be passed in a suit by the puisne mortgagee, when the prior mortgage-debt was due on the date of suit, is to allow him to redeem the prior mortgage and sell the estate for both his amount and the redemption amount. If the mortgage-debt was not due on the date of suit, the puisne mortgagee can obtain a decree for sale subject to the prior mortgage.

Mortgage decree—(*continued*).

The puisne mortgagee is bound to pay the whole amount due under the prior mortgage, and not merely the amount paid by the assignee thereof.

S. 96, T. P. A., does not imply that the puisne mortgagee is not required to redeem the prior mortgagee when the latter is a party to the suit.

Semble:—S. 96, T. P. A., is intended to cover the cases in which the prior mortgagee is not a party to the suit but intervenes after the decree.

Venkataramana Aiyar v. Gompertz. 298

———**Decree for sale** *subject to a prior usufructuary mortgage held by plaintiff himself—Propriety.*

There is nothing to prevent a Court from granting a person a decree for sale on a second mortgage of his, subject to a prior usufructuary mortgage on the same property held by himself.

Radha Krishnier v. Muthusami Sholagan. 564

Mortgage decree—For sale—Nature—*Effect of—Right of mortgagor to pay money at any time before expiry of the month after sale. C.P.C., 310 A*:—*See* Transfer of Property Act, S. 88. 259

Native State—East India Company—Cantonment Land—*Rights of alienation and management and control of the same in the absence of any treaty.*

When the Nizam's Government admitted a British force within its territory and allotted to it the Secunderabad Cantonment as its Head Quarters, it no doubt, by necessary implication, conveyed to the Military authorities all powers of jurisdiction, control and management incident to maintaining the efficiency of the troops, and the peace and good order and convenient use of the Cantonment.

But it would be going a long way beyond this to hold that the officer commanding the troops could be held empowered to alienate, in perpetuity, land forming part of the cantonment, and undoubtedly Hyderabad territory, for a purpose wholly unconnected with military requirements, *e. g.*, the building of a Tower of Silence for the Parsi Community as in this case.

Held also, that the effect of the averments in the suit was to show a title in the plaintiff-appellants' predecessors to the plot in question as against the whole community of which they (the predecessors) were members.

Pestonji v. Edulji; P. C. 199

Negotiable Instruments Act, S. 84 (2)—*Cheque, presentation—Reasonable time—Presidency Small Cause Courts Act, S. 69—Question of fact.*

The question whether a cheque is presented within a reasonable time has to be determined with regard to the nature of the instrument, the usage of trade and of bankers, and the facts of the particular case. It is a question of fact, and as such is not one which can be referred to the High Court under S. 69 of the Presidency Small Cause Courts Act.

E. and A. I. Deposit and Loan Society (Ld.) v. T. M. Nair ... 465

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Notice—*Landlord and Tenant—Disclaimer in written statement does not make notice unnecessary* :—*See* Landlord and Tenant—Ejectment ... 153

1. **Onus—Damage**—*Proof when necessary—Water supply—Obstruction to ryotwari landholder by another landholder*—*See* Tort 178

2. ———**Fraud**—*Suit for damages for fraud—Limitation Starting point*—*See* Limitation Act, Art. 95 19

3. ———**Hindu Law—Inheritance**—*Disqualification. by complicity in murder of deceased—Quantum of proof* :—*See* Hindu Law—Inheritance .. 70

4. ———**Hindu Law—Widow**—*Alienation—Legal necessity* :—*See* Hindu Law—Widow. 100

5. ———**Legislation to extinguish proprietary rights in land** —*See* Assam Regulation III of 1891 549

Parties—Joinder of in appeal—*See* C.P.C., S. 559 ... 452

Partition suit—Parties—*Debtors parties—Bad for misjoinder of causes of action* :—*See* C.P.C., S 28. 85

Partnership—Right of suit by one member against another on *pro-note executed in his favour by the others—Unliquidated claim—Hindu Law—Joint family—Liability of other members.*

A suit is maintainable by one member of a firm upon a pro-note given him by two other members of the firm in respect of an advance made by him to the firm; and it is not competent to the other members to set off any unliquidated claim they may have against the plaintiff in respect of the partnership.

The suit on the pro-note is not a suit against the firm by one of the members.

Subbiah v. *Venkataramiah* 347

Penal Code, S. 211—*False charge—Statement under S. 162, Cr. P. C., not false charge—Statement to Police of non-cognizable offence—Complaint to Village Munsif.*

In order to constitute the offence of preferring a false charge, the charge must be made before an officer entitled to investigate. An accusation before an official who has nothing to do with the administration of justice, or an accusation of non-cognizable offence before the Police or of any offence before a Village Magistrate in respect of which he has no powers to investigate or send up for trial, cannot bring the accuser within the scope of S. 211, I. P. C.

A statement made in answer to questions under S. 162, Cr. P. C., by a Police officer cannot be made the basis of a prosecution for an offence under S. 211, Cr. P. C.

In re Ramana Goud 573

———**S. 224**—*Escape from lawful custody.*

A man legally arrested for an offence must submit to be tried and dealt with according to law. If he gains his liberty before he is delivered by due

Penal Code—(*continued*).

course of law, he commits the offence of "escape," even when the escape is effected by the consent or the neglect of the person that kept the prisoner in custody. *Queen Empress* v *Muppan* (I. L. R. 18 M. 401) followed.

The Public Prosecutor v. *Ramasami Konan* 540

Pleader and client—*Party not entitled to raise points not pressed by the vakil in the Lower Court.*

A party cannot be allowed to raise a contention not pressed by the vakil in the Lower Court.

Padmanabhadu v. *Rajappa* 188

Pleadings—*Reversioner's suit to set aside alienations by widow—Contents of pleading—See* Hindu Law—Widow 11, 18

Practice—Parties—*Non-joinder—Suit by one of several trustees impleading co-trustee as defendant.*

A suit by one trustee impleading a co-trustee as defendant is not liable to be dismissed on the ground that plaintiff has failed to prove that the defendant co-trustee refused to join him as co-plaintiff. *Parameswaram* v. *Shangaran* (I. L. R. 14 M. 489) followed.

Rasu Mudaliar v. *Veerasami Pillai.* 495

———**Parties**—*Partition suit—Debtors parties—Misjoinder by causes of action* :—*See* C. P. C., S. 28 85

Presidency Banks Act—*Right of members to inspect books of Bank* :—*See* Corporation. 385

Presidency Small Cause Courts Act, S. 69—*Construction of document—Difference of opinion—Reference— S. 622, C.P.C. applicable* :—*See* C. P. C., S. 622. 480

————**S 69**—*Reference of a question of fact—Negotiable Instruments Act, S. 84 (2)—Question whether cheque was presented within reasonable time a question of fact and cannot be inferred—Execution—High Court* :—*See* Negotiable Instruments Act, S. 84 (2). ... 465

Presumption—Hindu Law—*Gift to Wife—Malik*:— *See* Hindu Law—Will. 7

————*Marriage*—Essentials :—*See* Marriage. 8

Privy Council—Practice—*Point not submitted to either Court in India raised before the Privy Council—Issues—Construction* :—Their Lordships declined to entertain a point raised by the appellants as covered by a certain issue as the point was not submitted to either of the Courts below and the parties have, by their conduct of the case, shown that they construed the issue in a narrower sense.

Mawun Din v. *Malkin* 3

————*Question of fact* :—Where a question is one of fact, their Lordships will not interfere even if it should appear that there was evidence such as might justify either view without any clear preponderance or probability.

Fatima Bibi v. *Shaik Ahmed Buksh* ... ...

Privy Council- (*continued*). PAGE.

——**Question of fact—Concurrent findings**—*Consideration of law in the process of reasoning—Possession for less than 60 years as proof of title.*

Their Lordships also held that they were entitled to go into a question of fact even though there be concurrent findings on it if at every point in the process of reasoning on the question considerations of law have to be regarded. In this case, though the evidence as to possession and enjoyment was insufficient to found a title by adverse possession for sixty years, their Lordships relied upon it as proof of title and on the strength of that evidence reversed the judgments of the Courts below.

Mahamad Ali v. Secretary of State 549

Pro-note—*Right of suit—Payee impleaded as defendant.*

A person other than the payee of a pro-note has no right of suit thereon whether the pro-note is one negotiable or non-negotiable. The fact that the payee is impleaded as defendant cannot alter the principle.

Subramanya Iyan v. Arunachala Iyan 185

Provincial Small Cause Courts Act, Art. 31—*Suit for share of mesne profits wrongfully received—Jurisdiction.*

A suit for the share of mesne profits alleged by the plaintiff to have been wrongfully received by the defendant falls under Art. 31 of the Provincial Small Cause Courts Act, and is consequently not cognizable by a Court of Small Causes.

Venkoba Rao v. Muthu Aiyer 88

Religious Endowment—Katlai—*Purchase of land in the name of Idol—Deed in the custody of donor—No reservation—Power to appoint Manager of the Katlai.*

A person who absolutely makes a gift of land for the purpose of a Katlai in favor of an idol, without reserving any rights whatever, cannot subsequently appoint a Manager for the Katlai. *Held also*, that the fact that the donor retained the deed of gift with herself was not sufficient evidence of any reservation of the power to appoint a Manager in the donor.

The conduct of the parties years after the execution of a deed is of no avail in construing the deed

Krishna Pillai v. Arunachela Chettiar 304

Religious Endowments—Trustee of Durga—*Bound to maintain accounts* 205

Miyaji v. Shaik Ahmed.

————**Act, S. 14**—*Decree, form of—Jurisdiction to appoint trustee—New trustee, appointment of—Mahomedan Law—Durga—Duties of trustee—Accounts, liability to keep—Married man, incompetency of, to be a Jaincshin.*

A trustee of a Durga is bound to maintain accounts; and if the institution falls under S. 4 of Act XX of 1863, he is bound also to submit the accounts to the Committee.

	M. L. J. PAGE
Religious Endowments Act—(*continued*).	
Under S. 14 of Act XX of 1863, the Court has jurisdiction to direct a competent person to appoint a trustee and to direct delivery of possession by the dismissed trustee to the person properly appointed. If there is no person competent to represent the trust, the proper course is to appoint a receiver and direct delivery of possession to him. So long as a trustee is in possession, whether before or after dismissal, he is liable to render accounts. A dismissed trustee is entitled to get a discharge and to be relieved of all obligations as a trustee by the Court.	
Quære—Whether the Court itself has jurisdiction to appoint a trustee. A married man is unfit to be a Jamashin of a Durga according to usage.	
Miyaji v. *Sheik Ahmed*	205
Right of suit—*Execution sale of insolvent's properties held after vesting order—Right of purchaser, to maintain suit.*	
An insolvent ceases to have any interest in his properties as soon as a vesting order under S. 7 of the Insolvency Act is made; and an auction-purchaser in an execution sale of the insolvent's interest in certain properties held after the date of the vesting order acquires no interest in the properties.	
Sundrappa Iyer v. *Arunachella Chettiar*	487
———**Water supply**—*Obstruction—Proof of damage when necessary to sustain action* :—*See* Tort.	39
———**Ryotwari land-holder**—*Government and Ryotwari land-holders, relation between—Obstruction of water supply—Right of suit—Damage—Proof—Onus.*	178
———**Set-off in restitution** :—See C. P. C., S. 544 ...	39
Statutes—Construction—*Applicability of principles embodied in Act to cases outside the Act—English Common Law, applicability of, to Indian cases*:—	
Per *Sankaran Nair* J.—Though an act may be inapplicable it ought to be followed as a rule of justice, equity and good conscience in cases similar to those dealt with by the Legislature and in the case of a ship-owner's liability, the principles embodied in Act IV of 1865 ought to be followed. A rule of English Common Law ought not to be followed when it is opposed to the principles followed and acted upon by the Indian Legislature.	
Sheik Mahamed Rowther v. *B. I. S. N. Co.*; F.B.	497
———**Construction of word** — *Absence of definition*—In construing an Act, in the absence of a definition of a word in the Act itself, the presumption is that the word is used in its ordinary and popular meaning.	
The Mylapore Fund v. *The Madras Corporation*	349
———**Taxing Statute**—The subject is not to be taxed unless the language of the statute clearly imposes the obligation; and in cases of reasonable doubt the construction most beneficial to the subject is to be adopted.	
The Mylapore Fund v. *The Madras Corporation*	349

Stage of Criminal proceedings pending Civil Appeal S. 476, Cr. P. C.—*Pending appeal on the Civil Side—Letters Patent, Cls. 28 and 29—Jurisdiction of High Court* :—See Charter Act, S. 15 ... 466

Step in aid of execution :—*See* Limitation Act, Art. 179, Cl. 4.

Succession Act, S. 187—*Suit by beneficiary against legatee for enforcement of trust*—Per *Sankaran Nair* J. (*Wallis* J. *dissentiente*).—S. 187 of the Succession Act is no bar to a suit by a beneficiary against a legatee entitled to letters of administration for enforcement of a trust created by the testator by virtue of some secret instructions not embodied in the will.

Per *Sankaran Nair* J:—Though the title as an administrator does not vest in the administrator until the grant of the letters, yet when the letters of administration are granted they relate back to the testator's death and all acts done by a party who afterwards becomes administrator for the benefit of the estate or to fulfil the wishes of the testator are valid and binding on the estate.

An *executor de son tort* or universal legatee cannot plead his omission to take out letters of administration in a suit brought by a beneficiary to enforce the trusts which he is bound to discharge.

Per *Wallis* J :—A legacy cannot be recovered without administration of the testator's estate, and a suit by a beneficiary for the enforcement of a trust cannot be maintained in the absence of a grant of letters of administration.

Louis Kunha v. *Souza* 158

Succession Certificate Act, Ss. 19, 3—*Appeal from Vizagapatam Agent's order—Madras Act XXIV of* 1839, *S. 3, Rule X, Cl. 4*—"*District Court*"—"*District Judge.*"

The Agent to the Governor in Council at Vizagapatam is the Judge of the principal Civil Court of original jurisdiction in the Agency, and consequently the Court over which he presides is a District Court within the meaning of S. 3 of the General Clauses Act.

An appeal lies under S. 19 of the Succession Certificate Act from the order of the agent.

Gurucaraju Gobinatha v. *Tripathi* 252

Tenancy in Common—*Ouster—Damages.*

An assigne of the interest of one of several co-sharers is entitled to all the rights of the assignor, but if the assignee be ousted from exclusive possession of any part of the undivided share, the assignee cannot recover damages for the same.

Ramanna v. *Ghattamangni* 258

Tort—Libel—Defamation—Privilege—*Accused person—Reply to notice.*

No action for libel or slander lies whether against judges, counsel, witnesses, or parties for words written or spoken in the ordinary course of any proceeding before any court or tribunal recognised by law. The principle applies

Tort—(*continued.*)

equally in the case of accused persons in respect of words written or spoken for purposes of defence.

This privilege extends to statements made in reply to notices of action so long as the allegation is confined to the matter in hand and is relevant.

Pachaiperumal Chettiai v. Dasi Thangam 358

Torts—Obstruction of water-supply—*Ryotwari landholder—Government and Ryotwari landholders, relation between—Damage—Proof—Onus—Right of suit—Tort—Violation of legal right.*

A violation of legal right committed knowingly is a cause of action, and it is a violation of legal right to interfere with contractual relations recognised by law, if there be no sufficient justification for the interference. An interference by defendants (landholders) with plaintiff's right as ryotwari landholder to the supply of water from a Government channel for the irrigation of his lands gives rise to a cause of action against the defendants—whether the plaintiff's right be contractual or proprietary—and the plaintiff is entitled to an injunction irrespective of the question of damage if the interference amounted to a total deprivation to the plaintiff of his water-supply

Per *Chief Justice*:—*Semble*:—Damage may have to be proved if the result of the obstruction had been merely to diminish the supply of water to plaintiff.

Semble:—It may well be that if Government had blocked up the channel, the plaintiff would have no cause of action against them if the Government had made other provision to supply the plaintiff with water sufficient to meet his accustomed requirements.

Even if damage is not to be presumed, in this case the onus is on the defendants who wrongfully interfere with the plaintiff's right to prove that there was no damage.

Per *Miller* J.:—Though there must be some damage to support an action for the infringement of the plaintiff's right; it is enough to show that the act complained of was done in such a way as to be likely to damage the plaintiff, though proof of specific damage be not given. If the effect of the defendant's act was to drive the plaintiff to seek a precarious water-supply, dependent on the good will of others, the Court will be justified in inferring damage.

Rama Odayan v. Subramania Aiyar 175

1. Transfer of Property Act, S. 6 (*a*)—*Release of Reversioner's right when not a transfer of a chance of succession—Hindu Law—Widow—Compromise of doubtful right—When can be set aside by party.*

The fact that the right is on the side of one party is not sufficient for the party to set aside a compromise entered into by him on the supposition of a doubtful right.

Held also:—That a release of all claims by a reversioner to an estate held by a widow in recognition of her absolute right to the "estate of the last owner" asserted by her to have been obtained under the will of her husband is not a transfer of "a chance of succession" within the meaning of S. 6 (*a*) of the Transfer of Property Act, but is a mere agreement not to disturb the widow in her enjoyment of the property absolutely.

Olati Pulliah Chetty v. Varadarajulu Chetty 469

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T. P. Act—(*continued.*)

2. ———**S. 43**—*Transfer of Inam land—Inam inalienable.*

Subsequent enfranchisement, effect of.

Statement in the deed that lands were sold to vendor.

If an inalienable inam is transferred and the inam is subsequently enfranchised, the transferee is entitled to claim the land.

Held also that a statement in the transfer deed that the lands were sold to the vendor amounted to a representation by him that he was entitled to transfer it within the meaning of S. 43, T. P. A.

Anagannya v. *Narasanna* 247

3. ———**Ss. 56, 67, 81**—"*As against the seller*"—*Marshalling as between a first mortgagee and a subsequent purchaser of one of the mortgaged properties—Mortgage decree, form of.*

A mortgagee is entitled to be paid the whole of his debt from whatever portion of the mortgaged properties he chooses; and where of two items *A* and *B* mortgaged, item *A* was subsequently purchased by another, the vendee is not entitled as of right to compel the mortgagee to proceed against item *B* before selling item *A*.

It is no doubt open to the Court to order that item *B* be sold first if the mortgagee will not be prejudiced by that course as well as to order the sale of item *A* and to stop the sale of item *A* if the sale proceeds of *B* would prove sufficient to discharge the debt. The right given to the purchaser by reason of S. 56, T. P. A., is not an equity which can be enforced to the prejudice of third parties like the prior mortgagee, but is confined to the mortgagor and his legal representatives claiming as volunteers under him. *Krishnaiyyar* v. *Muthukumaraswamy Pillay*, (I. L. R. 29 M. 217), explained.

Komminent Appayya v. *Mangala Rangayya* 229

4. ———**S. 59**—"**Attest**—*Mortgage—Execution*

A marriage deed is not attested within the meaning of S. 59 of the Transfer of Property Act, if the witnesses are not present at the execution but affix their signatures on the acknowledgment by the mortgagor of the execution of the instrument by him. The meaning of the word "attested" explained. The rule is different in the case of Wills in India.

Shamu Patter v. *Abdul Kadir* 219

5. S. 67—*See T. P. A.*, (3).

6. ———**S. 76**—"*Contract to the contrary.*"

A mortgage deed ran in the following terms:—"In consideration of an advance of Rs. 795-8-0 the mortgagee is to hold possession, for 12 years, of land yielding a *vattam* of 80 paras of paddy and Rs. 10 and is to pay a *purappad* of 12 paras of paddy and 12 fanams and 50 cocoanut leaves having deducted interest and Government revenue."

Held, that there was no contract to the contrary within the meaning of S. 76, T. P. A., and that the burden of an enhancement in the Government-revenue fell upon the mortgagee. The mortgagee should *prima facie* bear the burden of an enhanced assessment, and it is on the mortgagee to prove a contract to the contrary in order to escape liability.

Tuppan Nambudri v. Chinna Pari Kutti 31

T. P. Act—(*continued.*)

7. ————**S. 81—Marshalling**—As between first mortgagee and a subsequent purchaser of one of the mortgaged properties—*See* Transfer of Property Act, S. 56 229

8. ————**Ss 88, 93**—*Decree for sale—Time fixed for payment, effect of—Payment after time but before completion of sale—Mortgagor's rights—Mortgage decree for sale—No conversion into decree for foreclosure—Interest, rate of—Mortgage decree, form of.*

The mortgagor (judgment-debtor) in a suit for sale on the mortgage is entitled to stop execution by payment of the debt at any time before the completion of the sale. The execution sale is not finally complete until the defendant has had an opportunity of obtaining its rescission, under S. 310-A.

The mortgagor judgment-debtor is under no necessity of showing good cause for not paying within the time fixed in the decree.

The ruling in *Vallabha Valia Rajah v. Vedapuratti* should not be extended in its operation to suits for sale against the mortgagor.

Obiter —A sale may, under Ss 88 and 92, T. P. A., be ordered in lieu of foreclosure in a suit for foreclosure or redemption, but a decree for sale cannot be converted into one for foreclosure.

The time limit fixed in a decree for sale for payment of the mortgage money is primarily and principally a restriction on the mortgagee decree-holder by staying his hands from executing the decree.

A decree for sale under S. 88, T. P. A., is a final decree and all subsequent proceedings in execution, and to them the provisions of the C. P. C. are, so far as they may be applicable, to be applied.

Audipuranum Pillay v. Gopalasawmi Mudally.. 259

9. ————**S. 93—Extension of time for payment unnecessary in a decree for sale**—*Mortgagor entitled to pay at any time till 30 days after sale—C. P. C, S. 310-A* :—*See* Transfer of Property Act, S. 93... 259

10. ————**S. 96**—*No implication that puisne mortgagee not required to redeem when prior mortgagee is a party—Section intended to cover cases in which the prior mortgagee is not a party to the suit but intervenes after decree*—*See* Mortgage Decree, Form of 295

11. ————**S. 116**—"*Consent*"—*Holding over—Position of tenant holding over and his representatives—Representatives of tenant at sufferance—Trespassers—Limitation Act, Art. 139, 144—C. P. C. Ss. 281, 283—Res judicata.*

S. 116 of the Transfer of Property Act which enables the lessor or his representative by his assent to consent a tenant by sufferance into a yearly or monthly tenant does not enable him to convert the representative of a tenant by sufferance into such a tenant by a mere assent on his part, without the consent of such representative.

If a tenant by sufferance dies and his representative holds on, he holds on as a trespasser.

Adimulam v. Pir Rawthan [(1885) I. L. R., 8 M. 424 at 427] referred to. *Krishnaji Ramachandra v. Antoji Pandurang* [(1898) I. L. R. 18 B. 256] distinguished.

T. P. Act—(continued.)

The representatives of a tenant by sufferance who enter after his death are not tenants within the meaning of Art. 139 of the Limitation Act; and a suit against them is governed by Art. 144. An order passed under S. 281, C.P.C., is not conclusive against the judgment-debtor unless he is a party to the proceedings in which the order was passed.

An order under S. 281, C P.C., cannot be taken advantage of by a person who was not a party to the proceedings.

Narasimham v. *Seetharamamurthy* 26

Trust—Revocation—Deed—*Construction—Construing deed as will.*

If an instrument is a deed in form, in order to hold that it is testamentary or in the nature of a will, there must be something very special in the case; and unless there are circumstances which compel the Court to treat an instrument in the form of a deed as a will, the Court will not do so. *Patch* v. *Shore* (2 Dr. Sm. 589 S. C. 32 L.J. Ch. 185) referred to.

Held *Also* that the settlor of certain properties on certain charitable trusts who appointed himself as Hukdar for life and his grandson as Hukdar after his death could not, by a subsequent deed, revoke the appointment of his grandson and appoint a stranger

Mahadeva Iyer v. *Sankarasubramania Ayyar* 480

1. **Trusts Act, Ss. 5, 81, 83**—*S. 5—Proviso—Trustee holding for the benefit of the legal representative:—See Will* 158

2 ————**S. 84—Fraud—Sham sale**—*Judgment upholding transaction as real—Binding effect*—See C. P. C., S. 13 579

3. ————**S. 84**—*Scope of—Benami transfer in fraud of creditors—Fraud not carried out—Contract to sell by transferee with a third person—Plea of Benami transfer by transferor—Estoppel.*

Where a person transfers property to another benami in order to defeat creditors and the purpose is not carried out, the transferor is not estopped from relying upon the benami nature of the transaction in a suit for specific performance of a contract to sell entered into by the transferee with a third person. View of *Benson* J. in *Yaramathi Krishnayya* v. *Chandra Papayya* (I. L. R. 20 M. 326) doubted; *Kearly* v. *Thompson* (249 B. D. 742) not followed; *Jadunath Poddar* v. *Rup Lal Poddar* (I. L. R. 33 C. 967) distinguished. S. 84 of the Trusts Act sufficiently declares the law and policy to be enforced by Courts in India.

Munisami v. *Subbarayar* 151

Trustee, suit by—*Decree in plaintiff's favour—Appeal by defendants—Plaintiff's application to alter the judgment so as to defeat his own action—New plaintiff, joining of—Surrender of a decree in his favour by a trustee—Betrayal of trust—Refusal of the Court to alter the decree.*

The plaintiff, the hereditary trustee of a temple dedicated to the worship of Shiva, and where the customary ceremonies of Hindu worship were carried on, sued the defendants, who represented a caste called the Nadar or Shanar caste. The question between the parties was whether the defendants and the caste to which they belonged had legal right to enter and worship in the

Trustee—(*continued.*)

temple. The first Court decided against the defendants, who thereupon appealed to the High Court. The plaintiff thought fit to profess that he then saw that he and the Judge of the lower Court were wrong and asked the High Court that the Judgment of the lower Court should be altered so as to defeat his own action. The High Court, on being applied to, as their Lordships held very properly, reinforced the cause of the worshippers of the temple by joining certain new plaintiffs to the original plaintiff (whose confidence in the justice of his suit had by that time convalesced.)

The High Court refused to alter the decree, and their Lordships were of opinion that the principles applicable to the case of a trustee who thus betrayed his trust by surrendering a decree had been well stated and applied by the High Court.

Sankaralinga v. *Raja Rajeswara*, (P C.) 867

Unfair preference—*See* C. P. C., S. 861 189

Vakil's right of audience—*Insolvency appeals in the High Court.*

A Vakil has the right of audience before an appellate bench of the High Court in appeals from the Insolvency Court.

Mangiah Chetty v. *Ramiah Chetty* 565

Village Magistrate not subordinate to Sub-Magistrate within the meaning of S. 195, Cr. P. C.—*See* Cr P.C. S. 195 584

Waiver—Criminal trial—*Waiver of provisions regulating the trial—Illegality—Accused cannot waive.*

An accused person cannot in a criminal trial waive the benefit of the legal provisions regulating the trial. A misjoinder of charges vitiates the trial, and no waiver of the irregularity by the accused can cure it.

Rangasawmi v. *Emperor* 330

Water-supply—Obstruction of, to Ryotwari land-holder—*Damage—Proof when unnecessary—Onus* :—See Tort 178

1. Will—Bequest with instructions—*Instructions not carried out—Trust Act, Ss. 5, 81,83—S. 5, proviso—Trustee holding for the benefit of the legal representative—Estoppel—Contract—Fraud.*

Per *Curiam* :—If any individual on his death-bed, or at any other time, is persuaded by his heir at law, or his next of kin, to abstain from making a will, or if the same individual, having made a will, communicates the disposition to the person on the face of the will benefitted by that disposition, but at the same time says to that individual that he has a purpose to answer which he has not expressed in the will, but which he relies on the disponee to carry into effect and the disponee assents to it either expressly or by any mode of action which the disponee knows must give the testator the impression and belief that he fully assents to the request, then the heir-at-law in the one case, and the disponee in the other will be converted into trustees simply on the ground that an individual shall not be benefitted by his own personal fraud.

The proviso to S. 5 of the Trusts Act makes the English law applicable to India.

Per *Wallis* J.—The law is the same in India as in England in this matter. S. 81 of the Trusts Act has no application to the matter.

Will—(*continued.*) PAGE

Per *Curiam* :—Where a legatee with secret instructions to carry out some trust claims as universal legatee without disclosing the trust suppressing the instructions given by the testator, with the evident intention of retaining the estate himself, letters of administration cannot be granted to him even on the view that he has some beneficial interest in the estate, as the same will only enable him to commit fraud.

Per *Sankaran Nair* J.—S. 81 of the Trusts Act applies even if the testator intending to dispose of the beneficial interest to others leaves his estate to the devisee. The words "intended to dispose of the beneficial interest therein" in S. 81 have reference to the disposal of the beneficial interest by transfer or will. Differences between the English and Indian law pointed out. In the English law, evidence is admissible only to prove a trust but not to prove that the legal estate alone passed. In the Indian law, evidence is admissible to prove that the legal estate alone passed to the person named in the will. In India whenever it can be proved that the devisee was only intended to be a trustee, he holds the property only for the benefit of the testator's legal representatives, but in England he holds it for himself except in the case of communication of testator's wishes and consequent fraud on his part, or admission by him on his part that he holds only as a trustee.

Obiter :—Under the Indian Trusts Act, the beneficiary has no estate or interest in the subject matter of the trust. He has only a right to proceed against trustee.

Louis Kunha v. *Coelho* 158

2.————Construction—Principles—Life estate—"In trust"—"As she may require"—"For her maintenance and support."

In construing a will, technical words of known legal import must be given their legal effect even though the testator uses inconsistent words, unless those inconsistent words are of such a nature as to make it perfectly clear that the testator did not mean to use the technical terms in their proper sense.

Where there has been a devise or bequest of all a man's property, the generality of the disposition should not be cut down unless the intention that it should be so cut down is clear.

Ambiguous words in a will should generally be construed against the tenant for life. A will contained the following clauses :—"Cl. 1. I will and bequeath to my dear wife * * * *in trust* and for her maintenance and support during her life all the money, *property* goods and chattels of which I may die possessed whatever and wheresoever situated, and I appoint my dear wife Anne sole administratrix of this my last will and testament. Cl. 10. I further will that my dear wife Anne as sole executrix of this my last will and testament shall draw from current deposit accounts whether here or in Great Britain such sum or sums of money *as she may require* for her maintenance and for the working and maintenance of my property, and that she shall receive and dispose of all processes, rents and profits from the said property as to her may seem best in the interests of the property and I empower her to sell all or any part of the property at any time when it may appear to her that a favourable opportunity occurs."

Will—*(continued).*

Held on the construction of the will that the testator intended to give a life estate to his wife and that he did not intend to create a trust in the legal sense and that, if he did, he intended the trust to be for the benefit of his wife only.

The words "for her maintenance and support" in Cl. P. are words of description or motive and in no way cut down the life estate given to the wife.

The phrase "as she may require" in Cl. 10 means "as may be necessary" and not "as she may think fit."

Anne Wilson v. *George Oakes* 331

3. ———**Executors and residuary legatees**—*Equitable mortgage by residuary legatees to secure their business debt—Discovery of the mortgage by the legatees—Mortgagee's duty to investigate the title of the mortgagors—Constructive notice—Priority of legatees' claim over the mortgagees—Lapse of time—Minority—Possession by residuary legatees not inconsistent with the purpose of the will—Rights of parties.*

A mortgage by an executor, who is also residuary legatee, to secure his private debt may be set aside even at the suit of a pecuniary legatee, for the nature of the claims of legatees may be ascertained from the will. But as to creditors it is different. If a reasonable time has elapsed since the death of the testator, and then the executor deals with the testator's estate as his own, the purchaser may, in the absence of notice to the contrary assume that the debts have been paid or that there are other assets for payment of the debts, if any; and the mortgage would be safe as against creditors.

On *S. P.* died on Febraury 15, 1885. He left eight sons, four by his first wife. By his will, he left all his property to his elder sons, subject to a charge of Rs. 30,000 in favour of his widow *L.* and his younger sons. The elder sons became indebted to the Bank of Bombay. In 1899, the Bank obtained from them a formal mortgage on the same property, to secure the repayment of the money due to them. The property consisted of a house and a piece of land, to both of which the mortgagors declared themselves to be entitled, but both of which had been specified by *S. P.* in his will, as subject to the charge of Rs. 30,000 in favor of his widow and younger sons. That will was not among the documents of title deposited with the Bank but the root of the title to the house of *S. P.*, the more valuable of the two properties, was indicated in the will of one *S. P.* which was deposited; from that it appeared that the house had been the joint property of the two brothers.

The Bank's legal advisers made no investigation of the title of the mortgagors, and appeared to have assumed that the mortgagors were the absolute owners of the property mortgaged. It was not suggested that the mortgagors practised any concealment of the real facts. Nor was it suggested that the younger sons had any knowledge of the dealings of the elder sons with the Bank. Their Lordships agreed with both Courts in India in their decision that the legacy under the will in this case was charged upon the property in suit.

Will—*(continued.)*

Held also that, if the Bank's legal advisers had made any investigation of title they must have inquired how *S. P's.* share had come to the mortgagors, and in that way obtained cognizance of his will, and of the charge on that portion of his estate; that if the mortgagors had been asked about their father's will, it was to be presumed that they would have given an honest answer; that the mortgagee had constructive notice; and that the claim of the younger sons of *S. P* must prevail over the mortgage to the Bank and the title of the transferee.

Held further that, lapse of time was, no doubt, a circumstance that might be taken into consideration, in considering whether the Bank was not entitled to assume that the executors were acting with the consent of the legatees, but having regard to the fact that, in the present case two of the younger sons were still minors when the title deeds were deposited with the Bank and that continued possession by the elder sons was not inconsistent with the purposes of the will, the rights of the parties remained unaffected by that circumstance. *In re* Quale's Estate (17 L. R. Ir. 361) followed: *Graham* v. *Drummond* (L. R. 1. Ch. 968) distinguished.

Bank of Bombay v. *Suleman Somji (P. C.)* 435

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